

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7798
Summary Calendar

MARGARET OLIVE,

Plaintiff-Appellant,

VERSUS

UNITED STATES ELEVATOR CORP.,
AND MONTGOMERY ELEVATOR CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(91-CV-75)

(December 15, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Margaret Olive appeals the adverse judgments she received in the district court. Following trial the court granted Appellee Montgomery Elevator Co. (Montgomery) judgment as a matter of law before the case went to the jury. The jury rendered its verdict in favor of Appellee United States Elevator Corp. (USEC). Montgomery has moved to dismiss the appeal, and Olive has moved to strike record excerpts provided by USEC. We affirm, grant Montgomery's motion in part, and do not reach Olive's motion.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

Olive was allegedly injured when the elevator in which she was riding allegedly malfunctioned. She brought a products liability action based in strict liability against USEC, which manufactured and installed the elevator and maintained it until one year before the accident. The product at issue was a "SSD-1," which controlled the movement of the elevator. Olive also brought a negligence action against Montgomery, which maintained the elevator at the time of the accident. During discovery, Olive asked USEC for a list of recent lawsuits in which the functioning of the SSD-1 was at issue. Olive did not obtain this information in the form she wanted before trial.

At trial, Olive sought to elicit testimony from USEC's expert as to the frequency of prior claims involving the SSD-1. The trial judge refused to admit the evidence. At the close of Plaintiff's case, the court granted Montgomery's motion for judgment as a matter of law. The case against USEC went to the jury, which returned a verdict for USEC. The court denied Olive's motion for a new trial. This appeal followed.

DISCUSSION

On appeal, Olive asserts four errors: (1) whether the court should have enforced its discovery orders; (2) whether the court should have admitted the testimony regarding prior claims of SSD-1 malfunctions; (3) whether the court erred by granting Montgomery judgment as a matter of law; and (4) whether the jury verdict was

contrary to the overwhelming weight of the evidence. The parties have also filed two motions with the court. Montgomery's motion to dismiss the appeal applies to Issue 3; Olive's motion to strike USEC's record excerpts applies to Issue 1. We will address the motions together with the substantive issues.

I.

Olive first contends that USEC's failure to comply with the court's discovery orders requires reversal and a new trial. We do not reach the merits of her argument because Olive did not place it properly before the district court. We do not address on appeal an issue that has not been clearly presented to the district court so as to allow the district court to recognize the issue and rule on it. FDIC v. Mijalis, 15 F.3d 1314, 1327 (5th Cir. 1994); In re Pan Am. World Airways, Inc., 905 F.2d 1457, 1461-62 (11th Cir. 1990). In her motion for a new trial, Olive designated three assignments of error identical to issues two, three and four of this appeal. In her motion, Olive discussed the discovery dispute as a reason for reconsidering the evidentiary ruling. She did not request relief from the district court on the basis of the discovery dispute. Because the issue of discovery was not clearly presented to the district court, we will not consider it on appeal.²

II.

Olive contends that the court should have admitted evidence of similar accidents concerning the SSD-1. Evidence of similar

² Because we do not reach the merits of Olive's first issue on appeal, we need not decide her motion to strike USEC's record excerpts because they pertain solely to the issue of discovery.

accidents is admissible in product liability cases if the prior accidents are substantially similar to the one at issue. Shields v. Sturm, Ruger & Co., 864 F.2d 379, 381 (5th Cir. 1989). The court found that Olive had failed to establish the substantial similarity of the prior accidents. We review the district court's evidentiary ruling under an abuse of discretion standard. Id.

Olive made an offer of proof in which she demonstrated that USEC's expert had knowledge of twenty-five other lawsuits concerning the SSD-1. The district court nonetheless refused to admit the evidence because it concerned only alleged malfunctions. The evidence did not show that the SSD-1 was to blame for the prior accidents. We conclude that the trial court did not abuse its discretion.

III.

Olive next contends that the trial court improperly granted Montgomery judgment as a matter of law. Montgomery moves to dismiss this appeal on the basis that it was not timely filed. After granting judgment as a matter of law, the district court expressly directed the entry of final judgment under Federal Rule of Civil Procedure 54(b). Olive then raised the issue of the court's judgment for Montgomery in her motion for a new trial, which the court denied.³

³ A summary of the relevant dates is helpful at this point:

- Aug. 13: Court grants judgment for Montgomery.
- Aug. 26: Court enters final judgment in favor of USEC.
- Sept. 3: Olive serves motion for new trial.
- Oct. 26: Court enters order denying motion.
- Nov. 26: Olive asks for extension of time to appeal.
- Dec. 27: Olive files notice of appeal.

We dismiss Olive's appeal as to the court's entry of judgment as a matter of law. Olive did not serve her Rule 59 motion for a new trial within ten days of the court's entry of judgment as a matter of law. Because her motion was not timely, the motion did not suspend the time for filing the notice of appeal. Hoff v. International Longshoremen's Ass'n, Local No. 24, 799 F.2d 1087, 1089-90 (5th Cir. 1986). Notice of appeal in a civil action must be filed within thirty days of entry of the judgment from which appeal is taken. Fed. R. App. P. 4(a)(1). Since Olive's notice of appeal is untimely with regard to the judgment as a matter of law, we must dismiss her appeal of that judgment.

Olive timely filed her notice of appeal with regard to the trial court's denial of her motion for a new trial, so we may entertain her appeal on this basis. Because her Rule 59 motion was not timely, however, we treat it as a Rule 60 motion. Hoff, 799 F.2d at 1090. We review a trial court's denial of a Rule 60 motion for abuse of discretion. New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1200 (5th Cir. 1993).

In granting judgment as a matter of law, the district court determined that Olive presented insufficient evidence to show negligent maintenance by Montgomery. Furthermore, even if Montgomery were negligent, Olive presented no evidence that linked its negligence to the accident. The only evidence of causation put forth by Olive was by her expert, and his testimony was speculative. We conclude that the trial court did not abuse its discretion.

IV.

Lastly, Olive contends that the jury reached its verdict contrary to the overwhelming weight of the evidence. We must affirm the verdict if a rational jury could have reached the same conclusion. Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 987 (5th Cir. 1989). Our standard of review is fairly strict if the trial court denied a motion for a new trial. Id. at 986.

To recover under a theory of strict liability for products in Mississippi, Olive must show that the product in a defective condition was unreasonably dangerous. Toney v. Kawasaki Heavy Indus. Ltd., 975 F.2d 162, 165 (5th Cir. 1992). Both sides offered evidence on the issue of causation, which is an issue of fact. Although Olive contends that she destroyed the credibility of USEC's expert, that determination is for the jury. Furthermore, Olive's testimony itself is fraught with inconsistencies. The jury could weigh her testimony when determining whether she had proved her prima facie case. We conclude that sufficient evidence exists to support the jury's verdict.

CONCLUSION

For the foregoing reasons, the appeal of the district court's judgment is DISMISSED IN PART, AFFIRMED IN PART.