**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 94-20482

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TERRY CASKEY and FELICIA CASKEY,

Plaintiffs-Appellants,

VERSUS

MAN ROLAND, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas

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March 18, 1996

Before GARWOOD, SMITH, and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Plaintiffs Terry and Felicia Caskey[1] appeal the denial of their motion for a new trial. They argue that the district court abused its discretion by deciding to admit certain testimony and evidence that the defendant had failed to disclose during discovery. Concluding that any error was either harmless or invited by

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Felicia Caskey's injuries are derivative of Mr. Caskey's. She is a plaintiff only for the loss of household services and loss of consortium claims.

the plaintiffs, we affirm.

I.

We recount here the general factual framework of this case, leaving the details to the legal discussion below. In December 1989, Terry Caskey[2] suffered a back injury that prevented him from performing any physical labor for almost a year. This accident occurred well before the events that gave rise to this case.

Caskey returned to work in September 1990. On November 3, 1990, while working on a printing press, he sustained injuries to his back, neck, and other areas of his body.

Caskey then filed a suit in diversity against Man Roland, Inc. ("Man Roland"), the manufacturer of the printing press, proceeding under theories of product liability and breach of warranty. During the discovery process, both parties had access to Caskey's medical records, which reflected that Caskey walked with a limp and sometimes needed the help of a cane. They also contained the opinion of one of Caskey's doctors that Caskey should not use a wheelchair.

Caskey appeared at trial, unexpectedly in a wheelchair. He testified that he was unable to get around without a cane or wheelchair and that he could walk only with a cane and for short distances. He also testified that he had never claimed to be permanently disabled from the 1989 accident and that he had

[2] We refer to Terry Caskey as "Caskey" and to Felicia Caskey as "Mrs. Caskey."

completely recovered from that accident by the time of the 1990 accident. He further claimed to be concerned about paying his future medical expenses. He stated that this concern was causing him mental anguish.

At trial, disputes arose regarding the admissibility of certain evidence consisting of (1) Social Security Administration ("SSA") records and findings; (2) a videotape of Caskey walking to his truck with a limpSSbut without a caneSSand driving to a friend's house on November 14, 1992; and (3) the videographer's testimony authenticating the tape. The district court ultimately admitted all of this evidence.

The jury found that there was a defect in the printing press and that Man Roland had breached its warranty that the press was free from defects. The jury, however, apportioned 80% of the fault to Caskey and only 20% to Man Roland. The jury also awarded damages to the Caskeys.

After the verdict, the district court entered judgment as a matter of law for the defendant, ordering that the Caskeys take nothing.[3] The court then denied the Caskeys' motion for a new trial.

[3] The Texas law applicable at the time of trial prohibited a claimant from recovering damages for a strict products liability claim unless the claimant's percentage of responsibility was less than 60%. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(b) (West Supp. 1995). Texas has since amended this section of its code.

## II.

We review the denial of a motion for new trial for abuse of discretion. *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 515 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1536 (1994). We review admissions of evidence under the same standard. *Id.* We subject erroneous evidentiary admissions to a harmless error analysis as well. FED. R. EVID. 103.

Where appropriate, we may also apply the doctrine of invited error, which states that a party cannot be heard to complain of an error that it induced or provoked.[4] As we have stated elsewhere, a party may not invite an error and then complain of it.[5]

## III.

Caskey argues that the admission of the SSA records and findings was an abuse of discretion. First, he claims that the evidence confused the jury in violation of FED. R. EVID. 403. Second, he claims that the admitted evidence was either irrelevant

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[4] *See, e.g.*, *United States v. Gray*, 626 F.2d 494, 501 (5th Cir.), *cert. denied*, 449 U.S. 1038, *and cert. denied*, 449 U.S. 1038 (1980), *and cert. denied*, 449 U.S. 1091, *and cert. denied*, 450 U.S. 919 (1981) (holding that "a defendant who asks for an instruction will not be heard to complain about the instruction on appeal"); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1092-93 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (holding that, where the defendants put the general reputation of a pilot at issue, they will not be heard to complain that the district court erred in admitting evidence of that pilot's past deportment as a pilot).

[5] *See, e.g.*, *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991); *United States v. Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), *cert. denied*, 425 U.S. 938 (1976); *United States v. Nelson*, No. 95-40097, slip op. 17-18 (5th Cir. Nov. 21, 1995) (unpublished) (holding that, where defense counsel's remarks in closing argument invited response from prosecutor, defendant could not complain of prosecutorial misconduct during oral argument); *Capella v. Zurich Gen. Acc. Liab. Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (characterizing invited error as a "cardinal rule of appellate review").

or a violation of the collateral source rule. Because any error in admitting this evidence was invited, Caskey is estopped from asserting this argument.

Caskey testified that, as of November 3, 1990SSthe date of the accident at issue in this caseSShe had completely recovered from his back injury of December 1989, having experienced no recurrence of pain.[6] On cross-examination, he stated that he had never claimed to be permanently disabled as a result of the 1989 accident.

The district court allowed Man Roland to impeach this testimony by introducing a single documentSSa letter from Caskey to the SSA in which he claimed to be permanently disabled as a result of the 1989 accident. The court admitted no other SSA records or findings at this time. Caskey does not challenge this admission.

After introduction of this document, Caskey claimed that the SSA rejected his claim of permanent disability and turned down his request for disability benefits. He also testified that he was worried about his ability to pay future medical bills, claiming that this situation was causing him mental anguish.

The district court allowed Man Roland to contradict this testimony by introducing SSA records and findings. This evidence established that the SSA, after initially rejecting Caskey's claim, approved Caskey's claim upon reconsideration and granted him disability benefits. This evidence also established that Caskey's

[6] The events that gave rise to the December 1989 injury are distinct from the events that gave rise to the November 1990 injury. Man Roland and its printing press were not involved in the former accident.

disability benefits included payments for his future medical expenses.

We assume without deciding that admission of this evidence was error. We still do not reach this claim, however, because Caskey invited any such error. By claiming that the SSA had rejected his disability claim and denied him benefits, Caskey opened the door for Man Roland to introduce evidence that the SSA in fact had approved his claim on reconsideration and had granted him benefits, including payments for his future medical expenses. Caskey cannot now be heard to complain of such error.

IV.

Caskey argues that the admission of the videotape and the videographer's authenticating testimony was an abuse of discretion. He claims first that Man Roland was required to have disclosed the videotape and the identity of the videographer during discovery, pursuant to FED. R. CIV. P. 26. He also claims that Forsythe should not have been permitted to testify, because he had not been placed on Man Roland's witness list.

Caskey testified at trial that he had been house-ridden since 1990 and was unable to do anything without a cane or wheelchair. He claimed furthermore that he could not walk more than "a couple of steps" without a cane.

Unbeknownst to Caskey, Man Roland had commissioned a private investigator, James Forsythe, Jr., to conduct video surveillance of Caskey prior to trial. Forsythe performed such surveillance on

November 14, 1992. This session fell between two visits by Caskey to his doctors on November 12 and November 17 of that year. Man Roland had not disclosed the existence of this videotape to the Caskeys during the discovery process. It also had failed to identify the videographer, Forsythe, as a person with knowledge of relevant matters.

The contents of the videotape were consistent with the medical records provided to both parties during discovery, but not with Caskey's trial testimony. The videotape showed Caskey walking to his car and driving a short distance to a friend's house. No wheelchair ever appeared in the videotape. In fact, the videotape showed Caskey walking without even a cane.

Man Roland asked the district court to allow it to show the videotape to the jury. Caskey had had an opportunity to view the videotape outside the courtroom. He testified, outside the presence of the jury, that he could not tell whether he was the person in the videotape. Caskey's counsel repeatedly insisted that Man Roland bring in the videographer, Forsythe, to authenticate the tape. Man Roland agreed to do so.

Just as Man Roland prepared to show the videotape to the jury, Caskey objected on the ground that Man Roland had not included Forsythe on its witness list. It also objected on the ground that Man Roland had produced neither the tape nor Forsythe's identity during discovery. The district court admitted both the videotape and the authenticating testimony of the videographer. Forsythe's testimony consisted strictly of authenticating the videotape.

We assume, *arguendo*, that admission of the videotape was error. Our decision in *Chiasson* offers support for this assumption, particularly because the facts of *Chiasson* are similar to the facts here. We also assume, *agruendo*, that admission of the videographer's testimony was error. Nevertheless, we hold that neither error warrants reversal.

A.

Where the failure to disclose relevant evidence is harmless, exclusion is not required by the federal rules: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, *unless such failure is harmless*, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." FED. R. CIV. P. 37(c)(1) (emphasis added). Furthermore, FED. R. EVID. 103 establishes that an error is not reversible unless it affects a substantial right. *See Chiasson*, 988 F.2d at 518.

Caskey claims that the admission of the undisclosed videotape compromised his credibility before the jury. Caskey further claims that the defendant's use of the videotape tainted the jury's verdict because it conveyed to them the perception that he had been caught in a lie.

The contents of the videotape, however, were relevant only to damages, not liability,[7] as the historical facts concerning

[7] The same was true of the videotape in *Chiasson*. *Cf.* 988 F.2d at 514-15 (listing videotape's contents).

liability were essentially undisputed.[8] To the extent that Caskey's credibility was impugned, therefore, such impugnment was relevant only to damages and not to the liability component of the verdict.

Any effect on the damages component was irrelevant, because the jury found that Caskey was 80% at fault. As we have stated, *see* note 3, *supra*, Texas law at the time of trial prohibited a claimant from recovering damages for a strict products liability claim unless the claimant's percentage of responsibility was less than 60%. Caskey, therefore, was entitled to *no* damages, and any impugnment of his credibility in that regard was harmless.

*Chiasson* rested on distinctly different law and facts. The plaintiff in that case sued under the Jones Act, *see* 988 F.2d at 514, which permits recovery even when the plaintiff is contributorily negligent. *See* 46 U.S.C. App. § 688 (West Supp. 1995) (incorporating comparative negligence scheme of Federal Employers' Liability Act). The videotape in that case, then, was quite relevant to the issue of damages, because it did affect the amount of recovery, even though its effect was much mitigated by Chiasson's high level of comparative negligence (90%). *See Chiasson*, 988 F.2d at 515.

In contrast, Caskey was entitled to no recovery at all because of Texas law's contributory negligence defense. Whether the

[8] In this case, there were witnesses to Caskey's accident. In *Chiasson*, on the other hand, the plaintiff was the only witness to the accident. *See id.* at 514. Chiasson's credibility was therefore quite important to the liability component of her verdict.

videotape compromised his credibility as to damages was immaterial, and any error in admitting the videotape was therefore harmless.

There is another critical distinction between this case and *Chiasson*. The parties in *Chiasson* admitted that they would have settled the dispute if the videotape had been disclosed prior to trial. *See id.* at 518. No such concession was made in this case. We held in *Chiasson* that disclosure of the videotape could not have been harmless because (1) the parties' concession established that the failure to disclose the videotape had had a "fundamental effect on the outcome of the litigation," and (2) the effect of the videotape on the damages issue was "obvious." *See id.* Neither of those reasons applies to the instant case. Concluding that the failure to disclose the videotape was harmless, we hold that any error in admitting the videotape was harmless as well.

B.

As for Forsythe's testimony, Caskey's counsel repeatedly insisted that the videographer testify in order to authenticate the videotape. When Caskey refused to confirm whether he was the man in the videotape, Man Roland put Forsythe on the stand to authenticate the tape and to confirm that the man in the tape was indeed Terry Caskey. Although Caskey's counsel did ultimately object to Forsythe's appearance as a witness, this objection came far too lateSS*i.e.*, just as the tape was about to be shownSSand only after Caskey's counsel had insisted that Forsythe testify. Any error in admitting this testimony was invited by Caskey, and he cannot be

heard now to complain of such error.

In summary, all the errors of which Caskey complains on appeal were either harmless or invited. Accordingly, we AFFIRM.

Dennis, J. dissenting.

The majority holds that the admission of the undisclosed surveillance videotape was harmless error. Because Fed.R.Civ.P. 37(c)(1) requires exclusion of evidence for the defendant's blatant violation of the disclosure rules, and because I disagree that the admission of the undisclosed evidence constituted harmless error, I dissent.[9]

The plaintiffs made an interrogatory request for the names of "each person who has any knowledge of facts or discoverable matters, whether or not admissible, that are or may be relevant to any issue in this lawsuit." Subsequently, the defendants hired a private investigator to videotape Mr. Caskey limping without a cane on November 14, 1992, more than a year before the trial which commenced on February 16, 1994. Defense counsel failed to supplement their discovery response, not notifying the plaintiffs of the identity of the investigator and the existence of the tape until after commencement of trial at 8 p.m. on the night before the tape was shown to the jury.

In *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993), this court held that: (1) a surveillance videotape of the employee-plaintiff's daily activities was substantive evidence and, thus, had to be disclosed pursuant to a discovery request, regardless of any impeachment value, and (2) admission of the videotape following nondisclosure during discovery was reversible and not harmless error in light of the videotape's obvious important effect upon the verdict and the likely impact the video would have had on settlement negotiations had it been properly disclosed.

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[9] I agree with the majority that the admission of the Social Security Administration records was not in error. The majority opinion uses the concepts of "invited error" and "opening the door" interchangeably, however, yet the terms stand for somewhat different principles. Invited error prevents a party who purposefully fails to object to an opponent's inadmissible evidence from responding in kind with his own inadmissible evidence. The instant case invokes instead the doctrine of curative admissibility, or "opening the door," which allows a party to protect himself at trial, after inadmissible evidence has been introduced by the opposing party, by retorting in kind. 1 Wigmore § 15; 1 McCormick on Evidence § 57; 1 Weinstein's Evidence § 103[02]. Compare two of the cases cited by the majority: *United States v. Baytank (Houston), Inc*, 934 F.2d 599, 606 (5th Cir. 1991) (The invited error doctrine holds that a party cannot appeal a jury instruction it requested at trial) versus *Croce v. Bromley Corp.*, 623 F.2d 1084, 1092-3 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (Testimony developed by the defendant concerning his reputation "opened the door" for the admission of plaintiff's evidence regarding the pilot's past record.) I also note that neither doctrine could apply to the surveillance videotape.

In 1993, a new sanction for failure to make discovery disclosure was added by Fed.R.Civ.P. 37(c)(1). It provides that a party who, without substantial justification, fails to make disclosures required by Rules 26(a) and 26(e)(1) shall not be permitted to use such information or witness at trial, at a hearing, or on a motion, unless the failure to disclose is harmless. 4A Moore's Federal Practice § 37.04[1]. In large measure, this new sanction was intended to put teeth into the mandatory initial disclosure requirements added by the 1993 amendments. Wright, Miller & Marcus Federal Practice and Procedure § 2289.1. This new sanction strongly vindicates the 1993 decision in *Chiasson v. Zapata Gulf Marine Corp.*, *supra*, which was based on Fed.R.Civ.P. 26(b). Because the trial in the present case commenced on February 16, 1994, the trial court's decision was governed by both Fed.R.Civ.P. 37(c)(1) and the *Chiasson* precedent.

Man Roland failed to make disclosure of the surveillance videotape, despite the plaintiff's discovery request and the mandatory discovery requirements of Fed.R.Civ.P.26(a). The defendant showed no "substantial justification" for the delay, nor could it claim that the concealment of the surveillance tape until trial was harmless under Fed.R.Civ.P. 37(c)(1). The district court violated its discretion in failing to invoke the mandatory exclusion sanction of Rule 37(c)(1), an error which affected substantial rights of the plaintiff. Fed.R.Evid. 103.[10]

The majority opinion mischaracterizes Caskey's testimony as greatly inconsistent with the surveillance videotape. The plaintiff made clear in testimony that he received the wheelchair, after a long waiting period, three weeks before the trial in order to make it easier for him to get around. Caskey never claimed to use a wheelchair at the time the videotape was taken, indeed he testified that he could walk "a couple of steps" without a cane. The video showed him walking from his truck to a house. Moreover, the majority's discussion of conflict between Caskey's testimony and the undisclosed evidence is not relevant to its holding. *Chiasson,* 988 F.2d at 517, specifically rejected an impeachment exception to the exclusion of undisclosed evidence "because it flies directly in the

[10] The case involves discussion of two different types of "harmless error": whether the defendant's failure to disclose was harmless under 37(c)(1), and whether the trial court's inclusion of excluded evidence was harmless under Fed.R.Evid. 103.

face of the very purpose of discovery," the open evaluation of each party of the other's case before trial. The purpose of open discovery is not about the right to avoid being caught in a lie, but about avoiding the use of concealment and surprise as trial tactics, making a trial "less a game of blind man's b[l]uff and more a fair contest." *Id.* citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958).

F.R.C.P. 37(c)(1) contains an exception from exclusion when the defendant's failure to disclose is harmless. In this case, as in *Chiasson, supra* at 517, the effectiveness of the surveillance video came not from its use as impeachment evidence, because it did not seriously conflict with Mr. Caskey's testimony, but in its use as a surprise meant to create the impression that the defendant caught the plaintiff in a lie with the aid of a private investigator. Thus, not only was the defendant's failure to disclose the evidence not harmless, its value resulted from the defendant's concealment of the evidence from the plaintiff before the trial to be sprung on him in court. The district court should have excluded the evidence as required by Rule 37(c)(1).

The district court's admission of the undisclosed videotape also did not constitute harmless error under Fed.R.Evid. 103. The nature of the surprise attack surely made a serious impact on the jury's assessment of Caskey's credibility, and therefore on its assessment of the proportion of his liability. Caskey's explanation of the videotape, that his doctors recommended that he walk without his cane for rehabilitation, but that he could not do so easily or often, rang hollow because it came after the surprise admission of the videotape. The plaintiff's credibility is a pervasive issue. Its effects cannot be hermetically sealed off from the liability issue, especially not at a trial by jury.

The jury awarded damages to Caskey, but held him 80% responsible for the injury. Texas law prohibited recovery for a claimant who was not less than 60% responsible. The influence of the erroneous admission on fault assignment created an even greater impact on the result of the case than in *Chiasson*, because Caskey received not just less but none of the damages computed by the jury.

The majority attempts to distinguish the present case from *Chiasson* because in that case

defense counsel admitted at oral argument both that the video had greater impact because the plaintiffs did not see it before trial, and that the defendant would have settled the case had it been forced to disclose the video before trial. Indeed, one of the purposes of open discovery is to promote settlement. Not surprisingly, the appellee in the present case does not admit so much, but proper disclosure of the evidence would have encouraged settlement in this case as well by diminishing much of the power of the surveillance videotape.

The discovery rules rely heavily on voluntary compliance, because a party can often never know about evidence withheld by its opponent. With Fed.R.Civ.P. 37(c)(1), Congress ensured that an undisclosing party may at least not make use of its own concealed evidence. The majority weakens that incentive structure by affirming this verdict despite the admission of undisclosed evidence harmful to the verdict.