

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50762
Summary Calendar

GWEN THOMPSON, Individually and as Next Friend of
HUNTER THOMPSON, a Minor, Et Al.,

Plaintiffs,

GWEN THOMPSON, Individually and as Next Friend of
HUNTER THOMPSON, a Minor,

Plaintiff-Appellant,

VERSUS

GARY RUSSELL GAAR and ICI AMERICAS, INC.,

Defendants-Appellees.

GWEN THOMPSON, ET AL.,

Plaintiffs,

GWEN THOMPSON,

Plaintiff-Appellant,

versus

GARY RUSSELL GAAR, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(DR-92-CA-11 c/w 92-CV-34)

(June 13, 1995)

Before SMITH, WIENER, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

Gary Gaar accidentally shot and killed his friend, Melvin Clinton "Tommy" Thompson, Jr., while the two were hunting turkey and deer in Uvalde County, Texas. It is undisputed that Gaar was acting in the course and scope of his employment with ICI Americas, Inc., at the time of the accident.

Thompson's widow, Gwen, brought this wrongful death action under Texas law against Gaar and ICI, in her individual capacity and as next friend to the couple's minor son, Hunter (collectively "the Thompsons"). Defendants Gaar and ICI moved for summary judgment.

In its memorandum opinion denying summary judgment, the district court found that a host of material fact issues remained for resolution at trial. Interrogatories were submitted to the jury, which found that the negligence, if any, of Gaar had not proximately caused the hunting accident but that the decedent Thompson himself had caused it. The jury found the damages to Gwen and Hunter Thompson, including pecuniary loss, loss of companionship and society, and mental anguish, to be null.¹ The district

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

¹ In so finding, the jury appears to have overlooked the court's instruction not to reduce the amounts, if any, because of the negligence of Tommy Thompson.

court entered final judgment against the Thompsons based upon the jury verdict.

The Thompsons moved for a new trial, alleging that Gaar had been negligent as a matter of law by shooting in the decedent's direction. Noting that the Thompsons had neither pleaded negligence per se nor moved for an instructed verdict at the close of the evidence, the court reviewed the evidence presented to the jury and denied the motion.

II.

The Thompsons argue that the district court erred by submitting a broad form negligence interrogatory, encompassing both negligence and proximate cause, to the jury. Second, they aver that the burden of proof somehow at trial had been shifted by the district court's memorandum opinion denying defendants' motion for summary judgment and that the court therefore erred by instructing the jury that the plaintiff bore the burden of proof. The Thompsons waived these complaints, however, by failing to state them as distinct objections at the charge conference. See FED. R. CIV. P. 51; Smith v. Great Am. Restaurants, Inc., 969 F.2d 430, 436 (7th Cir. 1992); Haupt v. Atwood Oceanics, Inc., 681 F.2d 1058, 1062 (5th Cir. 1982).

III.

Next, the Thompsons challenge the sufficiency of the evidence supporting the jury's finding that Thompson's negligence was the

sole and proximate cause of his death. A jury verdict must be upheld unless the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. Marcel v. Placid Oil Co., 11 F.3d 563, 566 (5th Cir. 1994).

The jury's findings were amply supported by the evidence. The defendants presented testimony that Tommy Thompson deviated from the hunting plan Thompson and Gaar had developed, negligently causing his own death. Specifically, Gaar testified that he believed that Thompson was waiting on the rise, approximately 400 yards from him, and far to the right of his line of fire. Gaar testified that he believed this because of the joint hunting plan agreed upon by the two men, as Thompson had not signaled by honking the horn of the car or using any other method that the hunt was off or that he had deviated from the plan. Gaar testified that he had hunted with Thompson on many occasions and that the decedent had never before deviated from the hunting plan. The jury, relying upon this evidence, reasonably found that the Thompsons had not met their burden in proving Gaar negligent.

The jury finding of no proximate cause was also adequately supported. Under Texas law, the proximate cause inquiry encompasses both "but for" causation and foreseeability. See In re Air Crash at Dallas/Fort Worth Airport, 919 F.2d 1079, 1086 (5th Cir.), cert. denied, 502 U.S. 899 (1991). Based upon the testimony that Thompson had deviated from the plan without signaling, the jury reasonably inferred that it was unforeseeable to Gaar that Thompson

would be in his line of fire. Furthermore, the defendants' expert witness's testimony indicated that the wound to Thompson was caused by a bullet that had ricocheted unpredictably before entering him. The evidence supported the jury's finding of no proximate cause, as it supported a finding of no foreseeability.

AFFIRMED.