**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-60702**
**Summary Calendar**

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**JOE AINSWORTH,**

**Plaintiff-Appellant,**

**versus**

**CIRCLE K CONVENIENCE STORE, NO. 3721,**

**Defendant-Appellee.**

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**Appeal from the United States District Court for the Southern District of Mississippi (92-CV-11)**

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(May 25, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

In this premises liability diversity action, Joe Ainsworth appeals from the judgment, on a jury verdict, in favor of Circle K Convenience Store No. 3721. We **AFFIRM**.

I.

During rush-hour traffic, at approximately 5:30 p.m. on the bright, sunny afternoon of Friday, May 16, 1991, and in order to purchase gasoline for his car, Ainsworth went to the Circle K store located on a major thoroughfare near his home. After giving the

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

cashier $5, he began to pump gas. While doing so, he was approached by two males, one of whom demanded the keys to his car. He refused initially, but after one of the assailants displayed a weapon, he told an assailant that the keys were under the floor mat. As Ainsworth attempted to get out of the way of the moving vehicle, he fell and broke his hip.

In December 1991, Ainsworth filed suit against Circle K in Mississippi state court, seeking compensatory and punitive damages for Circle K's alleged negligence in failing to take measures to prevent the carjacking. Circle K removed the case to federal court; and it was tried to a jury, which found for Circle K in August 1994.

II.

Ainsworth contends that the district court abused its discretion by refusing to allow him to present rebuttal testimony, by refusing to give a requested jury instruction, and by denying his motion for judgment as a matter of law.

A.

Ainsworth maintains that the district court abused its discretion by refusing to allow him to present, as rebuttal evidence, the videotaped deposition of Jim Black, one of his expert witnesses. Ainsworth's other expert testified on direct examination during Ainsworth's case-in-chief that Circle K's failure to have a security guard present was a substantial factor in causing Ainsworth's injuries. On cross-examination, that expert testified that a security guard should have been present from 3:00

or 4:00 p.m. until 11:00 p.m. or midnight. On the other hand, Circle K's expert testified that a security guard was needed only during the late night hours, when the store was vulnerable to armed robberies. Ainsworth asserts that Black's testimony was appropriate to rebut the testimony of Circle K's expert regarding the hours during which a security guard was needed.

"The scope of rebuttal testimony is ordinarily a matter to be left to the sound discretion of the trial judge." ***Tramonte v. Fibreboard Corp.***, 947 F.2d 762, 764 (5th Cir. 1991) (internal quotation marks and citation omitted). Accordingly, "we will not overturn a district court's refusal to allow an expert to testify as a rebuttal witness unless that refusal was an abuse of discretion". ***Id***.

Ainsworth asserts that Black's testimony was proper rebuttal evidence, on the basis that his expert's cross-examination testimony regarding the hours for a security guard was not part of his case-in-chief. He cites ***Rodriguez v. Olin Corp.***, 780 F.2d 491 (5th Cir. 1986), for the propositions that a plaintiff "is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised on defense", and that questioning on cross-examination about a defensive theory does not make the responsive testimony a part of the plaintiff's case-in-chief.

Ainsworth's reliance on ***Rodriguez*** is misplaced. There, our court noted that "rebuttal is a term of art, denoting evidence introduced by a *plaintiff* to meet new facts brought out in his

opponent's case in chief". ***Id***. at 494 (internal quotation marks, brackets, and citation omitted); *see also* ***Tramonte***, 947 F.2d at 764 (citations omitted) (rebuttal evidence is generally admitted "either to counter facts presented in the defendant's case in chief, ... or to rebut evidence unavailable earlier through no fault of the plaintiff"). Circle K's expert's testimony regarding the hours during which a security guard should have been employed was not new; Ainsworth's other expert had already given his opinion, on direct examination, that a security guard should have been present at the time of the carjacking. The district court reviewed Black's deposition and found it to be improper rebuttal evidence, as well as cumulative of Ainsworth's other expert's testimony. It did not abuse its discretion.

B.

There was evidence that Circle K employees prepared incident reports of criminal activity at the premises; copies were kept at the store in question, and the corporate and district offices. However, Circle K's loss prevention specialist testified that the incident reports from 1985 through May 1991 had been destroyed pursuant to a document destruction policy.[2] Ainsworth contends that the district court erred by refusing to instruct the jury that, if it concluded that Circle K failed to provide a reasonable explanation for the document destruction, it could conclude that the documents contained information unfavorable to Circle K.

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[2] On cross-examination, he specifically denied that the documents had been destroyed because of Ainsworth's action.

We review the refusal to give a requested jury instruction for abuse of discretion. ***Jackson v. Taylor***, 912 F.2d 795, 798 (5th Cir. 1990). "[I]t is error to refuse a jury instruction only if there are pleadings and sufficient evidence to support the instruction". ***Id***.

Ainsworth's requested instruction was based on ***DeLaughter v. Lawrence County Hosp.***, 601 So. 2d 818 (Miss. 1992), in which the Mississippi Supreme Court stated that an adverse inference instruction should be given "where the evidence is positive that the [party] deliberately destroyed the [document] or where a record required by law to be kept is unavailable due to negligence". ***Id***. at 821-22. The district court found ***DeLaughter*** distinguishable, because the evidence did not show positively that Circle K deliberately destroyed the incident reports to prevent Ainsworth from relying on them, and because it was not required by law to maintain them. We find no abuse of discretion.

C.

Finally, Ainsworth contends that the district court erred by denying his motion for judgment as a matter of law. Although Ainsworth moved for judgment as a matter of law within ten days of entry of the judgment, he failed to do so at the close of his evidence and at the close of all the evidence. Accordingly, our inquiry is limited to "whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a manifest miscarriage of justice". *E.g.*, ***MacArthur v. University of***

***Tex. Health Center***, 45 F.3d 890, 896 n.8 (5th Cir. 1995) (internal quotations & citation omitted; emphasis in original); *see also* Fed. R. Civ. P. 50(a)(2) (emphasis added) ("Motions for judgment as a matter of law may be made at any time *before* submission of the case to the jury"); Fed. R. Civ. P. 50(b) (authorizing *renewal* of motion for judgment as a matter of law within ten days of entry of judgment).

To prevail on his claim, Ainsworth was required to prove (1) that Circle K should have foreseen criminal acts of third persons against customers; (2) that it negligently failed to take steps necessary to protect its customers from the risk of such criminal acts; and (3) that its negligence was the proximate cause of his injuries. *See* ***Crain v. Cleveland Lodge 1532, Order of Moose, Inc.***, 641 So. 2d 1186, 1189 (Miss. 1994). Although Ainsworth's expert witness testified that the carjacking was foreseeable to Circle K, and that Circle K disregarded its responsibility toward customers by not having a security guard on duty, he admitted on cross-examination that carjacking is a random crime, and that anyone can be a victim of it at any time. Circle K's expert agreed that carjacking is a spur-of-the-moment, unplanned, random crime, but opined that it was unforeseeable to Circle K. The jury was entitled to credit the testimony of Circle K's expert. *See* ***Garner v. Santoro***, 865 F.2d 629, 644 (5th Cir. 1989) (internal quotation marks and citation omitted) (in "battle of the experts, ... jury must be allowed to make credibility determinations and weigh the conflicting evidence in order to decide the likely truth of a

matter not itself initially resolvable by common knowledge or lay reasoning"). Accordingly, under our above stated narrow standard of review, there was evidence to support the jury's verdict.

III.

For the foregoing reasons, the judgment is

**AFFIRMED**.