

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3677

(Summary Calendar)

CARNIVAL CRUISE LINES, INC.,

Plaintiff,

versus

RED FOX INDUSTRIES, INC. and LLOYDS
UNDERWRITERS OF LONDON,

Defendants.

SIMANS SANCHEZ FLORES,

Plaintiff-Appellant,

versus

RED FOX INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(July 21, 1994)

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

ON PETITION FOR REHEARING

EMILIO M. GARZA, Circuit Judge:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby GRANTED. We hereby WITHDRAW our prior opinion and substitute the following:

Plaintiff Simans Sanchez Flores brought suit against his employer, Carnival Cruise Lines, Inc. ("Carnival"), and Red Fox Industries, Inc. ("Red Fox"), for injuries suffered while working aboard the T.S.S. Festivale. Flores settled with Carnival for \$75,000 before trial. A jury found that Flores had suffered total damages in the amount of \$145,387 and that two percent of the injury was caused by Red Fox. The district court then entered judgment against Red Fox in the amount of \$2,907.74, representing two percent of Flores's total damages plus prejudgment interest. Flores now appeals the judgment, arguing that the district court should have entered judgment against Red Fox in the amount of \$70,387, the difference between his damages and the settlement with Carnival. We affirm.

I

Flores initially argues that the district court erred in calculating Red Fox's liability using the jury's allocation of proportionate responsibility. In *McDermott, Inc. v. AmCyde*, ___ U.S. ___, 114 S. Ct. 1461, 1463, 128 L. Ed. 2d 148 (1994), the Supreme Court held that the liability of nonsettling tortfeasors in admiralty cases should be calculated with reference to the jury's allocation of proportionate responsibility. *McDermott* thus overruled our prior cases holding that a maritime plaintiff is

entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants. *E.g.*, *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S. Ct. 530, 102 L. Ed. 2d 562 (1988). Therefore, we must apply the proportionate approach mandated by *McDermott*.

Flores nonetheless contends that the Supreme Court's decision in *McDermott* should not be applied retroactively. However, when the Supreme Court

applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule.

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S. Ct. 2510, 2517, 125 L. Ed. 2d 74 (1993). Because this case was still open on direct review when the Supreme Court decided *McDermott*, we must apply the proportionate approach rule. Accordingly, we find that the district court correctly entered judgment against Red Fox in the amount of \$2,907.74, representing two percent of Flores's total damages plus prejudgment interest.¹

II

Flores next argues that the district court erred in instructing the jury "that it could not award damages for mental anguish or emotional distress caused by witnessing a bad sight or harm to another even though the plaintiff himself suffered severe

¹ Therefore, the district court correctly dismissed Flores's claim against Red Fox's insurance company, Lloyds Underwriters of London, because the total damages awarded did not exceed the \$10,000 deductible applicable to Red Fox's policy.

physical injury as a result of the accident." "Unfortunately, [Flores] has precluded meaningful review of this claim by failing to have transcribed the jury instructions given at trial." *Valendon-Martinez v. Hospital Presbiteriano de la Comunidad, Inc.*, 806 F.2d 1128, 1135 (1st Cir. 1986). Under Fed. R. App. P. 10(b)(1), it was Flores's duty to "order . . . a transcript of such parts of the proceedings not already on file as [he deemed] necessary."² Because Flores has failed to include a transcript of the jury instructions in the record on appeal, we will not review his claim of error.³ See *Powell v. Estelle*, 959 F.2d 22, 26 (5th Cir.) (refusing to consider appeal when appellant failed to provide transcript of relevant proceedings), *cert. denied*, ___ U.S. ___, 113 S. Ct. 668, 121 L. Ed. 2d 592 (1992); *Richardson v. Henry*, 902 F.2d 414, 416 (5th Cir.) (holding that "[t]he failure of an appellant to provide a transcript is a proper ground for dismissal of the appeal"), *cert. denied*, 498 U.S. 901, 111 S. Ct. 260, 112 L. Ed. 2d 218 (1990); *Valendon-Martinez*, 806 F.2d at 1135 (refusing to review a claim of error because the appellant did not provide a transcript of the challenged jury instructions).

² Flores's transcript order form filed in the district court merely stated "Transcript is unnecessary for appeal purposes."

³ Although the record excerpts submitted by Flores contain what he has described as a copy of the "pertinent portion of jury instruction," we have not found the original in the record on appeal. Because we are forbidden to consider what is not reflected in the record, we must disregard Flores's submission. See *Roberts v. Wal-Mart Stores, Inc.*, 7 F.3d 1256, 1259 (5th Cir. 1993) ("We can only review the record and do not take evidence to supplement or contradict it.").

III

For the foregoing reasons, we AFFIRM the judgment of the district court.