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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN CROW and CHERYL CROW, individually and as husband and wife; and as parent and guardian on behalf of J.M.C. on behalf of J.J.C. on behalf of G.E.C., Plaintiffs-Appellees, v. COSMO SPECIALTY FIBERS, INC., a Delaware Corporation, Defendant, and TRANS-SYSTEM, INC., DBA James J. Williams Bulk Service Transport, Inc., an Indiana corporation, Defendant-Appellant.	No. 17-35891 D.C. No. 3:15-cv-05665-RJB MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted February 5, 2019
Seattle, Washington

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,[**] Judge.

Defendant-Appellant Trans-System, Inc. ("Trans-System") appeals various aspects of a trial in which the jury found in favor of Plaintiffs-Appellees Steven and Cheryl Crow, on their own behalf and as parents and guardians of J.M.C., J.J.C., and G.E.C., minors (collectively, "Crow"). The court has jurisdiction under 28 U.S.C. § 1291.

Steven Crow worked at a truck shop adjacent to a Cosmo Specialty Fibers, Inc. ("Cosmo") pulp mill. Cosmo received a delivery of aqua ammonia from Trans-System on September 27, 2012.[1] Steven Crow sustained injuries on the same day. Crow sued and requested a jury trial.

In preparation for trial, Trans-System submitted an apportionment of fault instruction to the court, but the court reserved judgment on the instructions until the trial concluded. Pretrial Hr. 21:20–23, W.D. Wash. ECF 191. After the parties submitted their proposed instructions, but before trial, Trans-System's expert

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[**] The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

[1] The parties are familiar with the facts, so we only include a brief version here.

issued a new opinion that Steven Crow's injuries were the result of a separate sulfur dioxide exposure from the Cosmo facility that also occurred on September 27, 2012, subsequent to Trans-System's aqua ammonia delivery. The final jury instructions did not include the proposed apportionment of fault instruction. Trans-System objected at trial, stating:

> MR. HORNBROOK: Defense takes exception to Instruction No. 15. Defense has requested a section on strict liability with respect to Cosmo Specialty Fibers and the storage production of hazardous chemicals on its facility.
>
> THE COURT: Okay.
>
> MR. HORNBROOK: Defense also takes exception to the verdict form. It's our position that rather than "on plaintiffs' negligence claim, we find for" and then fill in the blank, it's defense's position that there should be a question as to whether or not the plaintiffs -- I am sorry, whether or not the jury finds that Defendant JJ Williams was negligent, yes or no. We also believe that with respect to the strict liability language in Section 2 on the verdict form, we believe that Cosmo should be included in that regard, specific to that instruction.
>
> THE COURT: Right.

The jury returned a verdict in favor of Crow.

Trans-System may have been entitled to an apportionment instruction if it had requested one, but Trans-System did not place the issue of whether it was entitled to an apportionment instruction squarely before the trial court when the court considered objections to the jury instructions. See Fed. R. Civ. P. 51. The

district court's decision not to give an apportionment instruction was not plain error in light of the evidence. See Fed. R. Civ. P. 51(d)(2); see also United States v. $11,500.00 in United States Currency, 869 F.3d 1062, 1068 (9th Cir. 2017) (reviewing jury instructions for plain error when appellant failed to object to the instructions).

The district court did not abuse its discretion in allowing Dr. Firestone's causation testimony. Dr. Firestone's testimony was reliable and admissible in light of the foundation laid at trial. Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1232–1236 (9th Cir. 2017).

Therefore, the district court did not abuse its discretion in denying the motion for a new trial. See Lam v. City of San Jose, 869 F.3d 1077, 1084 (9th Cir. 2017).

AFFIRMED.