UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7281
Summary Calendar

RONALD J. JEFFERSON,

Plaintiff-Appellant,

versus

GOLDEN CORRAL CORPORATION d/b/a
GOLDEN CORRAL RESTAURANT,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(S88-0451(G))

(January 27, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant, Ronald Jefferson (Jefferson), appeals the district court's judgment on the jury's verdict that defendant-appellee, Golden Corral Corporation (Corral), did not negligently cause his injuries. Jefferson asserts that the district court

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[*] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

erred in admitting into evidence three photographs showing that the curb height of the federal courthouse in Mississippi was about the same height as the curb at the Golden Corral Restaurant that allegedly caused his injuries. We hold that the district court did not commit reversible error and we affirm.

Facts and Proceedings Below

On September 4, 1987, Jefferson and his sister dined at the Golden Corral Restaurant in Gulfport, Mississippi. After dinner, at about 7:15 p.m., they left the restaurant. It was dark that night. Rather than walking down the incline leading from the door of the building, Jefferson attempted to step off of the inclined walkway near the side door of the restaurant. In the process, Jefferson lost his balance and fell, sustaining injuries. Jefferson sued Corral, asserting that the walkway was unreasonably dangerous because the curbs were too high and the area inadequately lit. At trial, Jefferson presented the testimony of two expert witnesses that the curb height of nine and one-quarter inches was abnormally high and that the Golden Corral parking lot was inadequately lit. The experts testified that curbs were normally five to seven inches high.

In rebuttal, Corral introduced pictures of the federal courthouse where the trial took place showing that the curb at the federal courthouse was about the same height as the curb from which Jefferson fell.[1] Jefferson's attorney objected to the admission of

[1] During the trial, the manager of the Golden Corral Restaurant noticed that the curb at the federal courthouse was high. He measured it, photographed it, and testified at trial that it was nine and one-quarter inches high. The admissibility

the photographs on the ground that they were not relevant evidence.

At trial, Corral's defense was that Jefferson fell because he was not paying attention to where he was walking and that Corral did not cause Jefferson's fall.

The jury found that Corral did not negligently cause Jefferson's fall and the district court entered judgment in favor of Corral. Jefferson appeals only on the ground that the district court committed reversible error in admitting into evidence the assertedly irrelevant photographs of the courthouse curb.

Discussion

Jefferson's principle argument is that the trial court abused its discretion in admitting the photographs because they had no probative value and were irrelevant.[2] Evidence that is irrelevant is not admissible. Fed. Rules of Evid. 401 & 402. "[T]he district court has wide and flexible discretion concerning the admissibility of evidence . . ." *Dixon v. International Harvester Co.*, 754 F.2d 573, 584 (5th Cir. 1985). "On appellate review, we will reverse the district court for an error in an evidentiary ruling only if a substantial right of a party is affected." *Muzyka v. Remington*

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of this testimony is not challenged on appeal.

[2] Jefferson also claims that the photographs should not have been admitted because they were not listed in the pretrial order and that introduction of the pictures surprised him. Jefferson failed to object on this ground below so we will not consider this argument. We note that district judges have broad discretion to fashion and modify pretrial orders. *Davis v. Duplantis*, 448 F.2d 918, 921 (5th Cir. 1971). Jefferson also argues on appeal that the prejudicial effect of the photographs was greater than their probative value under Federal Rule of Evidence 403. This also was not raised below and we refuse to consider it now.

Arms Co., Inc., 774 F.2d 1309, 1313 (5th Cir. 1985), citing Fed. R. Evid. 103(a) and Fed. R. Civ. P. 61.

Corral claims that the evidence was relevant because it rebutted the experts' claim that most curbs in Gulfport are five to seven inches high, not nine and one-quarter inches.[3]

However, Jefferson's expert witnesses did not testify that all curbs are between five and seven inches, only that most curbs are, and that shorter curbs are safer. Neither the pictures nor the testimony accompanying their introduction attempted to rebut the experts' opinions that most curbs were between five and seven inches high. The fact that the curbs on the courthouse were nine inches high does not mean that the curb heights were consistent with accepted building standards or that they were not dangerous. Also, the photographs do not reflect Gulfport standards inasmuch as the federal courthouse where the pictures were taken was in Biloxi, Mississippi, not Gulfport.

While perhaps a good argument can thus be made that the district court abused its discretion, we hold that any such error was harmless for several reasons. First, the jury found that Corral did not negligently *cause* Jefferson's injuries. While there was evidence that Corral created a dangerous condition by using high curbs and poor lighting, there was little evidence that this

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[3] Corral also claims that the photographs qualify as admissible demonstrative evidence. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985). This argument is of questionable merit. The photographs reflect a curb of a different shape from the one on which Jefferson fell and were taken during the day. Moreover, pictures of the actual curb in question were introduced at trial.

condition was *unreasonably* dangerous or that this condition *caused* Jefferson to fall. The jury could have easily concluded that Jefferson's fall was caused by his own carelessnesssQthat Jefferson was looking out into the parking lot when he fell, not looking at the asphalt at the base of the curb that he was going to step down upon. Second, the courthouse photographs would not likely have influenced the jury much because they were taken in daylight and involved curbs that were not used frequently. The jury would naturally have focused on the numerous pictures and diagrams of the Golden Corral Restaurant's parking lot, not on the courthouse pictures. The latter pictures were in no sense crucial, significant, or important. The mere fact that the curbs were attached to the courthouse does not make the asserted error harmful. Third, the photographs were not emphasized in Corral's closing argument. Fourth, as the jurors entered the courthouse for their participation in this case, they probably saw the courthouse curbs shown in the photographs and noticed their height (if, indeed, they had not noticed them previously). Finally, there was nothing inflammatory, or invidious, or the like about the photographs.

Conclusion

Jefferson has not demonstrated a reversible error. The judgment of the district court is accordingly

AFFIRMED.