

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7637
(Summary Calendar)

RONALD RAY FISHER,
Plaintiff-Appellant,
versus
R.D. WERNER CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-S90-0440(BR))

(May 3, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

In this products liability case, Plaintiff-Appellant Ronald Ray Fisher challenges three evidentiary rulings by the district court and one aspect of the court's jury instruction. Fisher insists that these errors mandate a new trial on his claims against Defendant-Appellee R.D. Werner Co., Inc. (Werner). Finding no abuse of discretion in the district court's evidentiary rulings and discerning no reversible error in the challenged jury instruction,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

we affirm.

I

FACTS AND PROCEEDINGS

Fisher initiated suit against Werner to recover for injuries he suffered while using a ladder manufactured by Werner. Fisher used the ladder to climb onto his patio roof. The accident at issue occurred when he attempted to descend from the roof. Fisher claimed at trial that in descending he had placed his left foot on the second rung and his right foot on the third rung, and that as he placed his full weight on the ladder its legs suddenly buckled and bent, causing him to fall backwards onto the concrete apron of his swimming pool. It is undisputed that in his fall Fisher suffered injuries to his back necessitating surgery.

In addition to his own testimony, Fisher adduced the eyewitness testimony of his neighbor as to the events surrounding the accident. Fisher premised his claim on the legal theory that the ladder was defectively designed and manufactured, making Werner responsible for his injuries under the theory of strict product liability in tort. To support his design defect theory, Fisher presented Dr. Douglas Muster, an expert in the fields of mechanical, design, forensic and safety engineering. Dr. Muster testified that in his opinion the ladder had an inherent weakness in the cross section of the bottom step and that this defect, combined with the lack of structural integrity of the ladder, caused the legs to buckle beneath Fisher.

Dr. Muster supplemented his testimony with in-court

demonstrations using the same model ladder. He also conducted demonstrations in court using a ladder of the same model in an effort to refute Werner's theory of the accident. Dr. Muster testified that the ladder could not withstand the dynamic loads placed on it by Fisher's use and indicated that he was unaware of any dynamic load study.¹ He admitted, however, that he had not personally done any dynamic load calculations.

According to Werner's theory of the accident, Fisher hit the ladder as he attempted to descend from the roof and that he then fell, knocking the ladder over, falling from the roof, and landing on the side of the ladder thereby causing the legs to buckle inward. In support of its theory, Werner presented the testimony of Dale King, a Werner employee. King proffered a video tape demonstrating that the damage to the ladder could result from the impact of a fifty pound load.² Prior to allowing the videotape to be shown to jury, the district court viewed it then ruled it admissible^{SO}but only with its narration redacted. In using the silent videotape, King expressly stated to the jury that the experiment depicted was not a re-creation of the accident, but merely an illustration of the difference between a fifty pound static load and a fifty pound impact load.

¹ Despite this assertion, meant to suggest that the ladder was defectively designed because Werner failed to conduct such a test, a portion of a dynamic load study conducted by Werner was found in the work file of Fisher's expert and was admitted into evidence.

² Moreover, he confirmed that Werner had in fact conducted a dynamic load study.

Based on all evidence submitted, including the videotape and in-court demonstrations, the jury returned a verdict in favor of Werner. Fisher timely appealed.

II

EVIDENTIARY RULINGS

A. Standard of Review

On appeal, Fisher challenges three evidentiary rulings by the court, to wit: (1) the videotaped experiment was inadmissible because the court did not require Werner to prove that the experiment was conducted under conditions substantially similar to those of the accident, and did not consider the prejudicial effect of the videotape as required under Fed. R. Evid. 403; (2) evidence regarding the sale of other ladders was inadmissible; and (3) King was not qualified as an expert witness in accident reconstruction. "The admission of . . . demonstrative evidence is within the trial court's sound discretion and will not be disturbed on appeal absent `abuse.'"³ Likewise within the sound discretion of the district court is the evaluation of a witness' qualifications as an expert.⁴

B. Admission of the Videotape

On appeal, Fisher renews his objections to the admission of the videotape of the fifty-pound impact experiment, insisting that Werner did not carry its burden of proving that the experiment was conducted under substantially similar circumstances as the

³ Shipp v. General Motors Corp., 750 F.2d 418, 427 (5th Cir. 1985)(citations omitted).

⁴ Dixon v. Int'l Harvester Co., 754 F.2d 573, 580 (5th Cir. 1985).

accident. Moreover, Fisher argues that the district court did not evaluate the prejudicial effect of the videotape, which Fisher insists confused the jury. Fisher phrases the issue as "under what foundation or requirement of showing will a party litigant have to provide for the admission of evidence of experimental testing performed by an expert witness." He maintains that under Barnes v. General Motors Co.⁵ a two-step approach is required, in which the party offering the evidence must first lay the proper evidentiary foundation, i.e., prove that the experiment was conducted under circumstances substantially similar to those surrounding the accident, and second the court must consider the potential prejudice of the videotape.

In Barnes, the case Fisher cites as controlling, the auto accident under consideration posed the question whether the left motor mount of the car separated, causing the accelerator to stick. Importantly, however, the car used in the experiment had been modified as a race car and no longer possessed the same mount structure. Instead, the motor in the test car was bolted directly to the frame, and in the experiment these atypical bolts were loosened. During the test, the motor liftedSOnot surprising as there were no secure bolts holding it in placeSOcausing the accelerator to stick. Consequently, the court concluded that the test was simply not probative of the contested issue whether the motor had actually separated, not whether it would separate if there were no bolts. Moreover, in presenting the test the

⁵ 547 F.2d 275 (5th Cir. 1977).

proponent apparently suggested that the test simulated the actual accident. Undeniably, the Barnes opinion expressed two concerns with this experiment: (1) it was conducted under dissimilar conditions and therefore was not probative; and (2) the admission of the evidence was confusing to the jury, causing unfair prejudice.

Here, in its consideration of the videotape, the district court recognized the importance of Barnes, but concluded that the experiment conducted by Werner was probative of the issue because it proved the physical possibility of Werner's theory. The court also noted that the videotape was very similar to Fisher's demonstrations conducted in court in an effort to support his theory and to refute Werner's hypothesis. The court then concluded that showing the tape to the jury would not be unfairly prejudicial, except as to the narration, and that was redacted.

Werner insists that, even considering Barnes, the district court's ruling does not constitute an abuse of discretion, arguing that not all demonstrations or experiments are identical in scope or purpose. We agree. King testified that the videotaped experiment was not a recreation of the accident. Rather, he explained, its purpose was to demonstrate the difference between a static dynamic load^{SO}which would result from stepping on the ladder's rungs^{SO}and a dynamic impact load^{SO}which would result if a man were to fall onto the ladder.

In more simplistic terms, Werner used the videotape to prove a general principle and not to recreate the particular accident.

In such cases, "the similarity requirement either is not applied or is highly diluted."⁶ In the instant case, Werner submitted that the ladder used in the experiment was the same ladder involved in the accident, thereby satisfying the most basic requirement that the subject ladders be the same. In addition, any potential for prejudice or confusion was eliminated by King's clear testimony that the experiment was not a recreation of the accident. Consequently, we find that the district court did not abuse its discretion by admitting the videotape. Moreover, the court obviously balanced the countervailing pros and cons and found that the probative value of the evidence exceeded its potential for confusion or prejudice.

C. Admission of Evidence of Prior Ladder Sales and Lack of Accidents

Fisher also takes issue with the admission of Werner's evidence regarding the number of ladders sold and accidents reported, insisting that Werner failed to satisfy the foundational requirements for adducing such data. We disagree. Werner introduced the sales summary only after Fisher opened the door to the subject by inquiring about a second accident involving a ladder of the same type. The court had previously informed Fisher that, once the foundational requirements had been met, it would allow the evidence to rebut Fisher's line of questioning. The court ruled

⁶ MCCORMICK ON EVIDENCE, § 202 at 601-03 (Edward W. Cleary, Ed. 3d ed. 1984). See also Young v. Illinois Cent. Gulf R. Co., 618 F.2d 332, 338 (5th Cir. 1980)(admitting videotape experiment demonstrating physical possibility that car could be diverted onto railroad tracks).

that Werner had established the proper foundation by its expert's testimony of his familiarity with the model of ladder involved in the accident. Moreover, King testified that the sales figures reflected sales of the same ladder model. It is this ruling to which Fisher objects.

In support of its ruling, the district court relied on two cases: Schwartz v. American Honda Motor Corp.,⁷ and Koloda v. General Motors Parts Div., Gen. Motors Corp.⁸ These cases stand for the basic proposition that evidence indicating the absence of prior accidents is admissible to prove lack of defect⁹ or lack of notice.¹⁰ As a prerequisite for admissibility of such evidence, however, the defendant must show "that the absence of prior accidents took place with respect to machines substantially identical to the one at issue and used in settings and circumstances sufficiently similar to those surrounding the machine at the time of the accident to allow the jury to connect past experience with the accident sued upon."¹¹ The district court ruled that Werner had established the similarity of the ladders and noted the impossibility of proving that all ladders were used in exactly the same manner.

⁷ 710 F.2d 378 (7th Cir. 1983).

⁸ 716 F.2d 373 (6th Cir. 1983).

⁹ Schwartz, 710 F.2d at 382.

¹⁰ Koloda, 716 F.2d at 376.

¹¹ Walker v. Trico Mfg. Co., 487 F.2d 595, 599 (7th Cir. 1973), cert. denied, 415 U.S. 978 (1974)(citations omitted).

Fisher contends that there is no evidence that these ladders were the same model or used in similar circumstances. As the record demonstrates, however, there is evidence in the form of King's direct testimony that the ladder used in the accident and these ladders the sales of which were recorded in the sale summary were the same model. As for the element of similar circumstances, we note that a "machine" as low tech as a ladder has only two basic uses: to be climbed, either up or down, and to be stood upon as an elevated work platform. Any variance in circumstances could not be significant for purposes of such data and the inferences to be drawn from them.

In reaching our decision on this issue, we consider a specific question: did the district court abuse its discretion in admitting the sales summary evidence under these circumstances. We decline to establish a broad rule for the foundation required to achieve admissibility of evidence of no prior accidents. We note though that "[w]hile these foundations may not be ideal, '[t]he sufficiency of foundation evidence varies from case to case and must be determined by an exercise of the trial court's discretion.'"¹² In this case, the circumstances are very narrow: Fisher was aware that if he inquired about the existence of prior accidents he would be opening the door to Werner's evidence of the sales summary.¹³ He nevertheless proceeded to open that door. We

¹² Schwartz, 710 F.2d at 382 (quoting Walker, 487 F.2d at 599).

¹³ In fact, at the beginning of the trial, Werner intended to introduce the sales summaries itself, and Fisher objected. In

find no abuse of discretion in allowing rebuttal testimony in the form of sales summaries of similar machines used under similar circumstances, and of the number or reported accidents, if any.

D. King's Qualification as an Expert Witness

In his final evidentiary challenge, Fisher objects to the court's qualification of King as an expert witness in the field of accident reconstruction. There is no record evidence, however, that the district court qualified King as an expert in accident reconstruction. Moreover, as we have found that the experiments conducted by King and presented to the jury by videotape were not reconstructions of the accident but instead were demonstrations of general principles, there could be no FRE Rule 403 unfair prejudice in admitting King's testimony even if, *arguendo*, we assumed that the trial court had qualified the witness as an expert.

III

JURY INSTRUCTION

The district court submitted instructions to the jury regarding Fisher's claim of design and manufacture defects. In addition, the court submitted jury instruction number 28, which Fisher challenges not as incorrect but as unnecessary. Jury instruction number 28 stated:

The Court instructs the jury that there is no duty to warn someone who is already aware of the danger or to place a warning on a product if the danger is open and obvious. Therefore, if you find from a preponderance of

his objections, however, Fisher acknowledged that "if we open a door to that particular testimony that the defendant would have that right possibly to come back in" with evidence of the sales summaries.

the evidence that users of the ladder know or should have known of a particular danger claimed by the Plaintiff, or if you find from said evidence that such claimed danger was open and obvious, then you must return a verdict for the Defendants, R.D. Werner on the basis of the issue of the failure to warn.

Fisher insists that at no time did Werner claim that there was an open and obvious danger associated with the use of the ladder; therefore the instruction was inappropriate.

Although Fisher is correct that Werner did not present this defense, he fails to acknowledge that he introduced this issue at several times during the proceedings. Specifically, Fisher's counsel asked both his expert witness, Dr. Muster, and Werner's expert witness, King, whether the ladder bore any warning regarding use. Given Fisher's several references to the issue of warnings¹⁴ thereby suggesting that Werner had been negligent in failing to warn¹⁴ the district court was entirely proper in instructing the jury that, under Mississippi law as it stood at the time,¹⁴ the manufacturer had no duty to warn of open and obvious conditions.

IV

CONCLUSION

Reviewing each of Fisher's evidentiary challenges for abuse of discretion, we conclude that the district court was well within its sound discretion to admit the videotaped experiment and the sales summaries. The videotaped experiment demonstrated a general principle and did not purport to reconstruct the accident, so

¹⁴ See Sperry-New Holland v. Prestage, 1993 Miss LEXIS 124 (Mar. 25, 1993).

Fisher's challenge of King's credentials as an expert in accident reconstruction is moot. As Fisher introduced the question of prior accidents, he cannot complain about the court's admission of the sales summary. Finally, we find no error in the district court's submission of instruction number 28 to the jury, as Fisher opened the door to the issue by alluding to the duty of Werner to warn of any dangers associated with the use of the ladder.

For the foregoing reasons, we the district court's opinion is AFFIRMED.