IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30335
(Summary Calendar)

JOSEPH L. RELF, JR.,

Plaintiff-Appellee,

v.

WAL-MART STORES, INC.

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(No. 91-1514(B))

(March 1, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[*]

In this slip-and-fall tort action, Defendant-Appellant Wal-Mart Stores, Inc. ("Wal-Mart") appeals a jury verdict in favor of Plaintiff-Appellee Joseph L. Relf, Jr., claiming, inter alia, that the district court abused its discretion in permitting Relf to admit in evidence certain subsequent remedial measures.[1] Agreeing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Wal-Mart also claims that the district court erred in prohibiting Wal-Mart from introducing certain impeachment

with Wal-Mart that the district court committed reversible error in admitting the subject evidence, we reverse the judgment of that court and remand for a new trial.

I

FACTS AND PROCEEDINGS

Relf claims that he tripped and fell while shopping in a Sam's Wholesale Club ("Sam's"), a store owned and operated by Wal-Mart. Relf testified that, while he was pushing a shopping cart down an aisle, he suddenly stumbled forward and landed on his hands and knees. Relf stated that he immediately looked back at the place where he tripped and noticed in the floor of the aisle a round "hole"))in actuality a circular depression approximately one-quarter inch deep and seven inches in diameter. The depression, in fact, was formerly a drain, which subsequently had been partially filled in with cement, but which had not been filled enough to make it perfectly level with the surrounding floor.

A store employee flagged down by Relf contacted an assistant manager who took Relf's statement and prepared an incident report.

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evidence, and that the evidence is insufficient to support the amount of the jury's damage award. As we conclude that the district court reversibly erred, requiring a new trial, we need not address those other alleged points of error, although we do believe the issues raised do warrant two brief comments.

We suspect that Wal-Mart's failure to comply with the trial court's pretrial order in the instant case, which resulted in the suppression of the impeachment evidence, will not reoccur in the new trial. We also find puzzling the fact that the jury awarded more for past medical expenses than the amount for which Relf submitted bills, and believe that the jury's conduct could indicate that it was confused as to the appropriate method to assess such damages))a confusion that, we trust, will be avoided in the new trial by appropriate guidance from the bench.

Other store employees photographed the depression, which later that evening was completely filled with cement to make it flush with the floor.

When Wal-Mart opened the following morning, Relf and a long-time acquaintance, Ambrose Pratt, arrived with camera in hand to photograph the spot where Relf had stumbled. Although Wal-Mart had already made the depression level with the floor, Pratt took pictures of the newly cemented floor anyway. The photographs depict a round patch of new cement straddled by a small yellow sawhorse made of plastic.[2]

Relf filed suit in Louisiana state court, asserting claims of negligence and strict liability.[3] Wal-Mart removed the action to federal court based on diversity jurisdiction, where, with the consent of both parties, the case was tried before a magistrate judge. Wal-Mart's motion in limine to exclude all evidence of its subsequent repair of the floor was denied by the trial court. A jury found Wal-Mart liable and Relf contributorily negligent for the accident, fifty percent each, and awarded Relf $75,000 in damages and past medical expenses. Wal-Mart's motion for a partial new trial or, in the alternative, remittitur was denied, and this appeal followed.

II

[2]On both sides of the sawhorse one can see a label reading, "caution," directly underneath of which is attached a hand-written sign stating, "do not move wet cement."

[3]Relf brought various claims under, inter alia, LA. CIV. CODE ANN. arts. 2315, 2317 and LA. REV. STAT. ANN. § 9:2800.6.

ANALYSIS

A. Standard of Review

We review a district court's evidentiary rulings for abuse of discretion and will reverse that court for such an error only if a substantial right of a party is affected.[4] But "if there is a reasonable likelihood that a substantial right was affected, we should not find the error harmless."[5]

B. Evidence of Subsequent Remedial Measures

Rule 407 provides,

> [w]hen, after an accident, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[6]

The district court concluded that the evidence was admissible to show whether (1) Wal-Mart should have been aware that the drain presented a possible hazard to patrons, and (2) it would be reasonable to require Wal-Mart to repair the floor. On appeal,

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[4] Fed. R. Evid. 103(a); Muzyka v. Remington Arms Co., 774 F.2d 1309, 1313 (5th Cir. 1985).

[5] Johnson v. William C. Ellis & Sons Iron Works, 609 F.2d 820, 823 (5th Cir. 1980).

[6] Fed. R. Evid 407. Rule 407 also applies to evidence involving strict liability claims. See Hardy v. Chemetron Corp., 870 F.2d 1007, 1010 (5th Cir. 1989) (citing Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983)); see, e.g., Cook v. McDonough Power Equip., Inc., 720 F.2d 829, 831 (5th Cir. 1983) (per curiam) (applying Rule 407 to determine admissibility of evidence in a product liability suit brought under Louisiana law).

Relf claims that the evidence is also admissible to prove, inter alia, Wal-Mart's ownership and control of Sam's, and the feasibility of repairing the floor. Relf further argues that the evidence is necessary to demonstrate the condition of the floor at the time of the accident, and that Wal-Mart opened the door to admission of such evidence by claiming to have exercised all reasonable care.[7]

Neither basis cited by the district court justifies the admission of evidence of Wal-Mart's subsequent repair of the floor. First, evidence that Wal-Mart had fixed the floor or that described the floor after the depression had been completely filled with cement is not probative of whether Wal-Mart should have been aware of the condition of the floor before the alleged accident occurred. Evidence relevant to whether Wal-Mart should have been aware of the alleged dangerous condition purportedly created by the uneven floor would include, e.g., the physical characteristics of the depression in the floor, how long the defect had been present, and how readily a Wal-Mart employee (or possibly a customer) could have spotted the potential hazard. All of those facts, however, concern the condition of the floor prior to Relf's alleged mishap))not after the floor was repaired.

Evidence that Wal-Mart actually did resurface the floor is

[7]Relf also urges that the evidence is admissible for impeachment, but fails to identify))and we cannot find))any testimony that is impeached by the evidence. Relf also apparently argues that he is entitled to offer evidence of subsequent remedial measures merely because Wal-Mart raised contributory negligence as a defense, but that is not the law.

probative of whether repair would be reasonably required, because such evidence can show that the repair is feasible.[8] The problem with offering the evidence to prove feasibility, however, is that Wal-Mart never contested that repair of the floor was feasible; and Rule 407 prohibits the use of evidence of subsequent remedial measures to prove feasibility of precautionary measures unless the issue is controverted.[9] Absent any dispute about feasibility of repair, evidence of subsequent repair was unnecessary for either of the purposes given by the district court in its ruling.

We are similarly unimpressed with Relf's explanations why evidence of subsequent remedial measures was properly admitted. As noted above, Wal-Mart did not contest the feasibility of making the repair; and, contrary to Relf's claims, Wal-Mart never contended that it did not own or control the premises. Moreover, evidence showing the condition of the floor after it was fixed was not necessary to demonstrate the condition of the floor at the time of the mishap: There was an abundance of evidence))including photographs of the floor taken after Relf's accident))that accurately depicted how the floor looked at the time Relf claims to have tripped.

Relf's argument that Wal-Mart opened the door to evidence of the subsequent remedial measures also misses the mark. Contrary to Relf's assertions, Wal-Mart did not claim that it took all

[8]The probative value of the evidence is slight, as applying cement to top off a quarter-inch deep depression caused by a drain in a floor is obviously a feasible repair.

[9]FED. R. EVID. 407.

reasonable precautions to prevent this mishap; Wal-Mart merely argued that it was not negligent and that the floor was not unreasonably dangerous under the circumstances.[10] As the Eleventh Circuit has explained, a defendant does not open the door to evidence of subsequent remedial measures merely by arguing that it was not negligent or that a dangerous condition did not exist.[11] In fact, to hold otherwise would eviscerate Rule 407, as evidence of subsequent remedial measures would then be admissible whenever a defendant contested its culpability.

In fact, the record makes quite clear that Relf offered the evidence for one purpose and one purpose only))to prove that Wal-Mart was liable. During his closing remarks, Relf argued unabashedly to the jury that Wal-Mart's decision to fix the floor indicated that the floor was unreasonably dangerous:

Sam's says nothing was wrong with the floor, but look

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[10]Compare Hardy, 870 F.2d at 1011 (noting that testimony did not characterize features of product in superlatives) with Polythane Sys. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1211 (5th Cir. 1993) (describing product as "one of the strongest in the world"), cert. denied, 114 S. Ct. 1064 (1994) and Muzyka v. Remington Arms Co., 774 F.2d 1309, 1313 (5th Cir. 1985) (portraying product as "the premier rifle, the best and the safest rifle of its kind on the market").

[11]Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1568 n.16 (11th Cir. 1991) ("`[L]awyers who simply claim that the conduct of a defendant was not negligent and was reasonable under the circumstances do not open the door to subsequent repair evidence, whereas lawyers who claim that all reasonable care was being taken do open the door to such evidence.'" (quoting STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 275 (4th ed. 1986)); see also 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 407[04], at 407-30 (1994) (explaining that defendants open door to subsequent repair evidence by claiming that "all possible care was being exercised at the time of the accident").

> what they did. . . . They did testify that what you see in [the photographs before the drain was filled with cement] was not an unreasonable risk. Well, maybe, maybe not, but if it wasn't, why did they repair it?

To make certain that we not miss his point, Relf reiterates his position on appeal, asking rhetorically: "If remedial action was (sic) not dictated by the condition of the floor area in question, why was remedial action taken?" But by so arguing, Relf reveals his basic misunderstanding of Rule 407 and merely cements our conclusion that the evidence was erroneously admitted and, most likely, used improperly by the jury.

The purpose of Rule 407 is to prohibit the use of evidence of subsequent remedial measures to prove that a dangerous condition existed (or that a party was guilty of negligence). Yet at trial Relf asked the jury to consider the evidence precisely for that forbidden purpose, i.e., to determine whether the floor presented an unreasonably dangerous condition to Sam's patrons. But Rule 407 is quite clear that evidence of subsequent repairs cannot be thus used: "When, after an accident, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."[12] Relf's own statements at trial and his own argument on appeal show that, contrary to his protestations otherwise, he did indeed offer evidence of the subsequent repairs in order to prove Wal-Mart's culpability))the very purpose for which the evidence cannot be

[12]FED. R. EVID 407 (emphasis added).

admitted.

As neither Relf nor the district court voiced a legitimate purpose for which the evidence of Wal-Mart's subsequent repairs could have been admitted))and our review of the record has uncovered none))we are led inexorably to the conclusion that the district court abused its discretion in admitting the evidence. Moreover, in light of Relf's closing argument, in which he urged the jury to misuse the evidence before it, and the district court's failure to mitigate that potential misuse by offering a curative instruction, we cannot say that the court's error is harmless. In fact, we believe that there is a reasonable likelihood that substantial rights were affected by the error, requiring that we reverse the jury's verdict and the district court's judgment, and remand the case for a new trial.

REVERSED and REMANDED.