IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60109

RANDY WALLER,

Plaintiff-Appellant,

versus

MASSEY-FERGUSON, INC., ET AL.,

Defendants,

MASSEY-FERGUSON, INC., MASSEY
FERGUSON MANUFACTURING, LIMITED,
A Subsidiary of Varity Corporation
Limited, VARITY CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of Mississippi
(91 CV 94)

August 15, 1995

Before REAVLEY, KING and WIENER, Circuit Judges.

REAVLEY, Circuit Judge:*

Randy Waller was severely injured in a tractor accident. He sued Massey-Ferguson, Inc., Massey Ferguson Manufacturing, Ltd.,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and Varity Corporation, Ltd.[1] (collectively Massey-Ferguson) under a products liability theory. The jury returned a take-nothing verdict in favor of Massey-Ferguson. Waller complains on appeal of several evidentiary rulings by the district court, and argues that the district court erred in denying his motion for a new trial. We affirm.

BACKGROUND

Operating the front-end loader attachment on his tractor, Waller was lifting a large round bale of hay weighing approximately a ton, when the bale rolled back over the tractor onto him. Massey-Ferguson manufactured both the tractor and the front-end loader. The hay fork attachment to the front-end loader, however, was manufactured by a third party.

Waller pursued a products liability theory of recovery, alleging defective design of the loader and tractor and insufficient warnings by the manufacturer. The jury heard extensive lay and expert testimony regarding the cause of the accident and the design of the tractor, loader and hay fork. Waller offered evidence that his injury could have been prevented through design features not found on the Massey-Ferguson equipment, including a falling object protection system (FOPS), and a self-leveling device or mechanical stop on the loader. Massey-Ferguson offered evidence that Waller had caused the accident by stacking the bales too high, pointing the hay fork

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[1] Varity Corporation, Ltd. is the parent company of Massey-Ferguson Manufacturing, Ltd.

skyward and allowing the bale to tip out of the hay fork, and perhaps causing the tractor to jerk forward at the time of the accident. Massey-Ferguson also focused on the hay fork which it did not manufacture, arguing that it should have had a large spike used to secure the bales of hay and prevent them from falling off the loader. For reasons unknown this spike was missing from Waller's hay fork. Massey-Ferguson also argued that the tractor in question, a Massey-Ferguson 390, was by design a low-profile tractor for use in certain applications such as poultry houses and orchards, and that a FOPS was not a needed or practical feature on such a tractor. Waller presented expert testimony to the contrary. Waller had purchased the tractor for its size rather than its low-profile feature.

The parties vigorously disputed the adequacy of the warnings given, and which warnings should have gone with which particular pieces of equipment. For example, the parties disputed whether warnings of the dangers of moving large round bales were best included with the hay baler, which in our case Massey-Ferguson did not manufacture, or the tractor or loader, which have many uses other than stacking hay bales.

Massey-Ferguson was also allowed, over Waller's objection, to present evidence that Waller had a long history of use of prescription narcotics, principally Percodan, that he had become dependent on these drugs, and that he was under their influence at the time of the accident. Waller had received prescriptions for Percodan from several different doctors. In the sixteen days

preceding the accident, he was prescribed 125 Percodan pills, and received Demoral shots as well.

DISCUSSION

A. *Evidentiary Rulings*

We have carefully reviewed the record. We emphasize at the outset that, in our view, the case was well-tried by highly competent counsel, and the district court gave each side ample opportunity to present its case.

Waller complains of several evidentiary rulings by the district court. Generally, we review a trial court's evidentiary rulings only for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir. 1993). "Under [FED. R. EVID.] 103(a), appellate courts should reverse on the basis of erroneous evidentiary rulings only if a party's substantial rights are affected. Moreover, the party asserting error based on erroneous rulings bears the burden of proving that the error was harmful." *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir. 1994) (citation omitted).

Waller first complains that the district court erred in allowing testimony of Waller's drug use prior to the date of the accident. He sought to exclude all such evidence. Waller denied using drugs on the day of the accident, and a co-worker, the only other witness to the accident, testified that he saw no indication of intoxication or drug use by Waller. However, several of Waller's treating physicians testified that Waller had a history of using a significant amount of pain medication. One

recommended that Waller seek treatment for a drug addiction problem, a second ended the physician-patient relationship because of Waller's "drug problem" and wanted him to seek psychological help for the problem, and a third was concerned that Waller was getting narcotics from other sources. Waller complains of this testimony, but complains most of the testimony of Dr. Brent Meador, presented by Massey-Ferguson as an expert in chemical dependency. Based on a review of Waller's records and his own knowledge of chemical dependency, Meador testified that, at the time of the accident, Waller was either under the influence of drugs or was suffering from withdrawal symptoms, and that in either case Waller's ability to operate the tractor would have been impaired. Meador also opined that Waller was an habitual user of narcotic drugs, that drug-dependent individuals will take medication when it is available, and that Percodan is a very strong pain medicine and very addictive.

Waller does not complain that Meador was unqualified to testify as an expert, and we note that "[a] trial court's ruling regarding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992). Instead, Waller argues that the evidence of drug use was of no probative value and highly prejudicial, thus rendering it inadmissible under FED. R. EVID. 403, and that the evidence did

not qualify as admissible evidence of habit under FED. R. EVID. 406.

We first consider FED. R. EVID. 406. As a general rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a). However, Rule 406 provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The question here is whether Waller's prior drug use rose to the level of a "habit" admissible under Rule 406, or was a mere "trait of character" inadmissible under Rule 404. The advisory committee note to Rule 406 notes that "evidence of intemperate `habits' is generally excluded when offered as proof of drunkenness in accident cases."

In *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir. 1979), the plaintiff was run over by a train. The railroad claimed that he was drunk and passed out on the tracks. We held that it was error to introduce four prior misdemeanor convictions for public intoxication over a three and one-half year period:

> The suggestion that the prior convictions constituted evidence of Reyes' "habit" of excessive drinking is equally unpersuasive. . . . Perhaps the chief difficulty in deciding questions of admissibility under Rule 406 arises in trying to draw the line between inadmissible character evidence and admissible habit evidence. . . . We do not undertake here to prescribe the precise quantum of proof necessary to transform a general disposition for excessive drinking into a

> "habit" of intemperance; we simply find that four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of "habit" evidence.

Id. at 794-95.

In *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985), the plaintiff was injured dismounting a tire rim. The court held that evidence of the plaintiff's prior drinking was admissible under Rule 406, and distinguished *Reyes* on grounds that a regular practice or pattern sufficient to show a habit had been shown:

> In *Reyes*, the court found that four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of "habit" evidence. Loughan argues that likewise, testimony from Thompson, Loughan's former employer between 1969 and 1971, was too remote in time and insufficient to establish Loughan's regular routine at the time of the accident in 1974. . . . Evidence adduced from three sources, taken together, demonstrates a uniform pattern of behavior. Loughan admitted that he carried a cooler of beer on his truck while employed by Slutz and that he would drink beer at some time between the hours of 9 a.m. and 5 p.m. Orr, Loughan's supervisor at Slutz, testified that Loughan routinely carried a cooler of beer on his truck and that he was in the habit of drinking on the job. Orr stated that complaints had been made by customers regarding Loughan's drinking while working on their equipment and that Loughan "normally" had something to drink in the early morning hours. Thompson, Loughan's former employer, further corroborated Loughan's habit when he testified that he fired Loughan because, based on his general observations and complaints from customers, he believed Loughan drank beer on the job. . . . We do not attempt here to develop a precise threshold of proof necessary to transform one's general disposition into a "habit"; on a close call, we will find the district court's admission of evidence relating to Loughan's drinking on the job rose to the level of habit pursuant to rule 406.

Id. at 1522-24.

Applying Rule 406, we likewise hold that the district court did not abuse its discretion in admitting the evidence. In this area we have recognized that there are no hard and fast rules. We believe that on our facts Massey-Ferguson showed enough of a habit of regular drug use to render the evidence admissible, and that we should defer to the district court's discretion on this evidentiary ruling.

Waller argues that the evidence of prior drug use was inadmissible in light of Waller's own testimony that he never took pain medication unless he could lie down, and had not taken any on the date of the accident. This argument fails to recognize that the whole purpose of Rule 406 is to allow proof of a person's conduct by reliable circumstantial evidence of prior behavior. The Rule itself provides for the admission of habit evidence "whether corroborated or not and regardless of the presence of eyewitnesses." *Loughan* rejected a similar argument:

> Loughan argues that because no direct evidence was presented that he had anything to drink at the time of the accident, it was improper to admit evidence to establish his "habit" of drinking on the job. We reject this reasoning because proof of habit is through indirect evidence offered to prove that the conduct of a person conformed with his routine practice. . . . Loughan asserts that he did not have anything to drink the day of the injury. . . . Evidence of habit or routine is to be weighed and considered by the trier of fact in the same manner as any other type of direct or circumstantial evidence. . . . Loughan is concerned that the evidence of a habit or routine does not establish conformance with the habit or routine on a particular occasion. To the contrary, such evidence, when substantial, allows the trier of facts to infer that the habit was conformed with on a particular occasion.

Id. at 1523.

We agree with Waller that evidence of his prior drug use posed a significant danger of unfair prejudice. We cannot say, however, that such evidence was without probative value. The evidence was relevant to the ultimate question of whether Waller's injuries were caused by an unreasonably dangerous product. Under the risk-utility analysis followed in Mississippi, the manufacturer does not have a duty "to create a completely safe product. . . . Instead, a manufacturer is charged with the duty to make its product reasonably safe . . . . In balancing the utility of the product against the risk it creates, an ordinary person's ability to avoid the danger by exercising care is also weighed." *Sperry-New Holland v. Prestage*, 617 So.2d 248, 256 (Miss. 1993). "The user's ability to avoid danger by the exercise of care in the use of the product" is a specific factor to consider in balancing the risk and utility of the product. *Id.* at 256 n.3. Hence, Waller's operation of the tractor and loader was relevant to whether Massey-Ferguson had manufactured unreasonably dangerous products.

The jury heard evidence that Waller had pointed the loader skyward, was stacking the bales too high, and may have caused the tractor to lurch at the time of the accident. In addition to proving an unreasonably dangerous product, the plaintiff must also prove that the product's defective condition caused his harm. *Id.* at 253. Again, Waller's operation of the tractor was relevant to the issue of causation. Finally, we note that balancing the probative value of evidence against its potential

for undue prejudice "lies within the sound discretion of the trial judge, and the decision to admit extrinsic evidence will not be disturbed absent a clear showing of an abuse of discretion." *United States v. Emery*, 682 F.2d 493, 497 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 465 (1982). *See also Carroll*, 17 F.3d at 791 (rejecting appellant's argument that evidence of patient's drug and alcohol use was unduly prejudicial). Here the evidence was probative, and the trial court was careful to admonish the jury to consider the evidence only insofar as it was relevant to the operation of the tractor on the day of the accident.[2] We find no abuse of discretion.

Waller next argues that, having allowed the testimony of Meador, the district court erred in refusing to allow a plaintiff's expert to testify in rebuttal. Waller sought to call Dr. Anthony Verlangieri. Verlangieri was prepared to testify that, based on the records of the emergency room where Waller was taken after the accident, there was no evidence that Waller was under the influence of narcotics. Specifically, the records indicated that Waller was calm and cooperative, and he received medication that would not have been given if there was evidence of drug dependency. The district court reasoned that Verlangieri's testimony was not proper rebuttal because it did not contradict Meador's testimony. Assuming without deciding that the district court erred in not allowing this testimony,

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[2] Massey-Ferguson also stated in its opening statement that it was offering the evidence solely for this purpose.

Waller does not establish that his substantial rights were affected. Verlangieri's testimony would not have directly contradicted Meador's. Meador's opinions were not based on the emergency room records. Further, the jury had heard evidence that while an alcohol test had been given to Waller in the emergency room, no test had been given to detect the presence of narcotics. Hence, the fact that Waller was treated with medication contraindicated for a drug-dependent patient was of marginal persuasive force, given the direct evidence of Waller's dependence provided by his own doctors and their records, and since Verlangieri had no personal knowledge of what physician-patient colloquy might have occurred in the emergency room regarding Waller's drug use. Further, to the extent that the hospital records showed that Waller was calm and cooperative after the accident, the court noted that those records were in evidence already and that plaintiff's counsel was free to argue from the records themselves.

Waller also complains that the district court erred in refusing to allow the jury to see a videotape which had been prepared for use in another case where a tractor operator had been injured by a falling bale of hay. The videotape records a demonstration where a bale of hay falls on a tractor with a falling object protection system (FOPS). The FOPS supports the bale. Waller had an attorney from the prior litigation to authenticate the exhibit. Massey-Ferguson's former safety manager had testified that a FOPS would not protect a tractor

operator from a falling bale of hay, and that the only test of a FOPS and falling hay bale he had observed was one on videotape in which the bale disintegrated and came into the operator's area of safety. In rebuttal Waller offered the videotape to rebut defense testimony that a FOPS would not protect the operator, and to impeach the testimony of the Massey-Ferguson safety manager. According to the attorney who was to authenticate the videotape, the safety manager had been involved in the prior litigation and had seen the tape.

The court listened to lengthy argument regarding this evidence. There was considerable uncertainty regarding the tape. It had been made in the mid-1970's, and the engineer who had prepared the test was deceased. There was no expert to testify as to the parameters of the test and the similarities of the test conditions with the conditions surrounding Waller's accident. The Massey-Ferguson safety manager had not been asked whether he had seen that particular videotape. The make of the tractor and loader were different from the ones in our case, and the weight of the bale of hay was uncertain, and probably considerably less than the weight of the bale which fell on Waller. The court had allowed other evidence of similar accidents, and expressed concern that further evidence of other accidents might unduly complicate the case. Given these circumstances we cannot say that the district court abused its discretion in excluding this evidence.

B. *Denial of Motion for New Trial*

Waller complains that the district court erred in denying his motion for new trial, arguing that the verdict was against the substantial weight of the evidence. We review the district court's denial of a motion for new trial under the abuse of discretion standard. *Bailey v. Daniel*, 967 F.2d 178, 179-80 (5th Cir. 1992). Massey-Ferguson offered ample evidence in support of the verdict. We find no abuse of discretion.

AFFIRMED.