

No. 03-35326
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

KENNETH L. JARAMILLO, Individually And As Personal Representative
of the Estates of ANGELA L. JARAMILLO and MCKENNA LEE
JARAMILLO; GERALD R. TARUTIS, as guardian ad litem for Riley R.
Jaramillo, a minor; BRADFORD J. FULTON, as guardian ad litem for
Sawyer D. Jaramillo, a minor,
Plaintiffs-Counter-Defendants-Appellants,

v.

FORD MOTOR COMPANY, a Delaware corporation,
Defendant-Appellee

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, TACOMA DIV.
HON. J. KELLY ARNOLD
U.S.D.C. No. CV-01-05311-JKA

OPENING BRIEF OF APPELLANTS/PETITIONERS

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I. STATEMENT OF JURISDICTION

A. Basis for the district court's subject-matter jurisdiction.

The District Court had subject matter jurisdiction under 28 U.S.C. §1332(a) in this case because the matter in controversy exceeded the sum of \$75,000, exclusive of interest and costs, and was between citizens of different States.

B. Basis for this Court's jurisdiction.

This Court has jurisdiction under 28 U.S.C. §1291 on the basis that Plaintiffs Jaramillo are appealing from a final decision of the District Court.

C. Filing dates establishing the timeliness of this appeal.

The filing dates establishing the timeliness of this appeal under FRAP 4(a)(1)(A) are: (1) the Judgment of the District Court was filed on March 18, 2003; and (2) the Notice of Appeal was filed by Plaintiffs on April 10, 2003.

D. Assertion that this appeal is from a final order or judgment that disposes of all of the parties' claims.

This appeal is from a final judgment of the district court that disposes of all of the parties' claims.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue One

Did the trial court abuse its discretion in allowing evidence of other rollover crashes involving vehicles and accident situations that were not substantially similar to the Jaramillo Ford Explorer?

Issue Two

Did the trial court abuse its discretion in admitting statistical evidence of dissimilar accidents and vehicles?

III. STATEMENT OF THE CASE

This case arises out of a rollover of new 1998 Ford Explorer that killed Angela Jaramillo and her five-year old daughter, McKenna Jaramillo. Angela died from injuries sustained when her head hit the asphalt through the driver's window, which broke as the Explorer rolled, and when her body was crushed by the vehicle's roof, which collapsed during the rollover. McKenna died when she was ejected from the rear middle seat of the rolling Explorer. Even though she was belted with a lap belt, McKenna was ejected from the Explorer because the lap belt failed by spooling out instead of restraining her.

Ken Jaramillo and his surviving children brought wrongful death and survival actions against Ford Motor Company under Washington's Product Liability Act for the deaths of Angela and McKenna. Plaintiffs claimed that the 1998 Ford Explorer was unstable in its design and that because of this it was prone to tipping and rolling over. Plaintiffs further claimed that the deaths of both

Angela and McKenna were proximately caused by the defective and unsafe design of the subject Explorer and of its component parts.¹

The trial in this case lasted 16 days. The jury returned a defense verdict in favor of Ford. This appeal followed.

On appeal, the Plaintiffs contend that the trial court abused its discretion and erred in admitting evidence of other rollover incidents involving vehicles and accident situations that were not substantially similar to the Jaramillo Ford Explorer. These included a Ford Escort sedan and a General Motors' Astro minivan. In arguing for the admission of this evidence, Ford told the Court that these vehicles had a higher static stability numbers than the Ford Explorer and that they also rollover. But Ford's expert witness was unable to provide any information regarding the static stability numbers for either the Ford Escort or the GMC Astro minivan. Because of this, admission of these dissimilar incidents served only to confuse the jury and to deflect its attention from the Ford Explorer that was the subject of this suit.

As with the evidence relating to the Ford Escort and the GMC Astro minivan, the trial court allowed Ford to offer statistical evidence regarding dissimilar rollover crashes involving SUVs as a class. No effort was made to show

¹ Under Washington's Product Liability Act, the "relevant product" is the component that caused the injuries. RCW 7.72.010(3): "...the 'relevant product' ... is that product or its component part or parts which gave rise to the product liability claim."

that the vehicles in these rollovers were similar to the Jaramillo Explorer or that these rollovers were in any way similar to the Jaramillo rollover. Plaintiffs also contend that the trial court abused its discretion and erred in admitting this statistical evidence of dissimilar accidents and vehicles.

IV. STATEMENT OF FACTS

A. The Collision.

In August of 1998, Ken and Angela Jaramillo of Grapeview, Washington were vacationing in Idaho with their three young children -- Riley, Sawyer and McKenna. E.R., pp. 43-44. On the day in question, August 5, 1998, the family was traveling east on Idaho's SR 20 in their new Ford Explorer. *Id.* Angela was driving, while Ken sat in the front passenger seat and entertained his children, who all sat in the rear passenger seat of the Explorer in booster seats. E.R., p. 64-65. Everyone but McKenna wore both a lap belt and a shoulder belt. E.R., p. 62. McKenna sat in the rear center seat of the Explorer and wore just a lap belt because the center seat did not have a shoulder belt. E.R., p. 69.

It was after 9 pm and had just turned dark. Ken had been playing a game called "I Spy" with his children, when he suddenly looked forward and saw several deer on the road. E.R., pp. 79-80. The next few moments tragically changed the family forever.

Angela Jaramillo swerved the Explorer to the left to avoid the deer coming from the right. E.R., p. 65. She then swerved right to avoid several other deer coming from the left. E.R., p. 66. During the swerve to the right, the tires on the passenger side of the vehicle went onto the shoulder of the road. Then the vehicle veered left again back onto the roadway. E.R., pp. 66-67. This caused the Explorer to fishtail and then roll at least four times until it finally came to a stop 275 feet down the road. E.R., pp. 67-68.

As it rolled, the Explorer's windows broke, and its roof collapsed on Angela. Angela's head hit the asphalt through the broken driver's window as the Explorer rolled and the collapsed roof crushed her body. Angela Jaramillo died on the scene later that night after being removed from the vehicle by rescue crews. E.R., pp. 43-44.

The Jaramillos' nightmare did not end with Angela's death. McKenna had been ejected from the vehicle as it rolled because the lap belt that secured her booster seat failed by spooling out. E.R., p. 69. Realizing that his daughter was missing, Ken Jaramillo left the side of his dying wife to look for McKenna along the roadway. E.R., p. 70. He found his daughter some distance from the vehicle and carried her lifeless body back to the scene. E.R., p. 71.

B. The Plaintiffs' claims.

The vehicle in question is a 1998 four-door, four-wheel-drive Ford Explorer. This model existed in the same configuration from 1995 through 2000. Accident data verifies that sport utility vehicles (SUVs), as a class, are more prone to rollover than other passenger vehicles. E.R., pp. 2, 196, 200. Accident data also verified that the 1995-2000 model of the Ford Explorer has been involved in hundreds of rollover crashes. E.R., p. 2.

Ken Jaramillo and his surviving children brought wrongful death and survival actions against Ford Motor Company for the deaths of Angela and McKenna. In these actions, the Plaintiffs claimed that Defendant Ford Motor Company was strictly liable under RCW 7.72.030(1)(a) and RCW 7.72.030(3)²

² RCW 7.72.030(1)(a) states:

- (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.
 - (a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: PROVIDED, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not

because Ford was aware from testing and field crash experience that the Ford Explorer, as it was designed, had stability problems and a tendency to tip and roll.

Plaintiffs further claimed that Ford Motor Company was strictly liable under RCW 7.72.030(1)(a), RCW 7.72.030(3), and *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974)³ for the enhanced injuries sustained by both Angela and McKenna. The Plaintiffs based their claim for Angela's death on a design defect in the Explorer's roof, which collapsed with high velocity from the rollover. The Plaintiffs also based their design defect claim for Angela's death on a combination of roof crush and seat belt slack that allowed her head to move outside the vehicle and strike the ground.

The Plaintiffs based their claim for McKenna's death on a design defect in the center lap belt retractor that caused the belt to spool and resulted in McKenna's ejection from the Explorer.

outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

RCW 7.72.030(3) states:

In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

³ See also *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976); *SeaFirst National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975); *SeaFirst National Bank v. Volkswagen of America*, 11 Wn. App. 929, 525 P.2d 1286 (1974).

As a part of each of these claims, the Plaintiffs also alleged that each individual design defect rendered the subject Explorer unsafe to an extent beyond that contemplated by an ordinary user and consumer and that because of this, Ford was strictly liable under both RCW 7.72.030(1)(a) and RCW 7.72.030(3) for the resulting injuries and harm.⁴

C. Dr. Vogler's Testimony

Prior to trial, Ford identified Dr. Michelle Vogler, a mechanical engineer, as one of its experts. E.R., p. 184. Even though she is not a statistician, Dr. Vogler purported to statistically compare rollovers of Ford Explorers with all other SUVs on the road in any kind of rollover. E.R., pp. 184, 197-207. She also purported to compare SUV rollovers as a class with a number of other classes of vehicles. E.R., p. 205-206. Using this statistical comparison, Dr. Vogler did an accident risk

⁴ Under RCW 7.72.030(1)(a) and RCW 7.72.030(3), Plaintiffs could prove their case against Ford in two different ways. First, Plaintiffs could show that the subject Ford Explorer was not reasonably safe as designed under RCW 7.72.030(1)(a) by showing that, at time of manufacture, the likelihood that the product would cause the plaintiffs harm or similar harms, and the seriousness of those harms, outweighed the manufacturer's burden to design a product that would have prevented those harms. Second, Plaintiffs could show that Ford failed to meet consumer expectations of safety as set forth in RCW 7.72.030(3). See *Falk v. Keene Corp.*, 113 Wn.2d 645, 654, 782 P.2d 974 (1989). In determining whether Ford failed to meet consumer safety expectations the jury could consider the relative cost of the product, the seriousness of the potential harm from the claimed defect, the cost and feasibility of eliminating or minimizing the risk and such other factors as the nature of the product and the claimed defect indicate are appropriate. See *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975); WPI 110.02.

analysis that concluded that (a) 1995-1999 Ford Explorer rollover accident risks are comparable to other sport utility vehicles; (b) the 1995-1999 Ford Explorer is a safe vehicle design and does not present an unreasonable risk of accident, injury, or ejection to the vehicle occupants; (c) the Ford Explorer fatal/severe occupant injury risks and ejection risks are comparable to other sport utility vehicles; (d) Ford Explorer and sport utility vehicles as a class have lower fatal/severe occupant injury risks than other types of vehicles; (e) belted occupants have significantly lower risks of severe/fatal injury than unbelted occupants do in all modes of accidents; (f) a high percentage of fatalities in rollover accidents are associated with occupant ejections, regardless of the type of vehicle; (g) the vast majority of ejections occur to unbelted occupants; (h) a combination and/or interaction of accident specific characteristics such as non-crash factors, pre-crash factors, and at-crash factors contribute to whether or not a motor vehicle accident involves a rollover event; and (i) the “static stability factor” of a vehicle is not a reliable predictor of vehicle accident rollover risk. E.R., pp. 28-29, 222-225.

Plaintiffs moved in limine to exclude Dr. Vogler’s testimony. Plaintiffs asserted that Dr. Vogler’s opinions were not relevant to the issue of whether or not the roof, seat belts, and stability mechanisms were safe as designed under RCW 7.72.030(1) & (2), or to the issue of whether consumer expectations of safety were met under RCW 7.72.030(3). Plaintiffs also asserted that Dr. Vogler’s testimony

should be excluded on the basis that her opinions were generated through a flawed analysis that relied on dissimilar accidents and vehicles and that she made no effort to identify any similar accidents and similar vehicles in her data. The trial court issued a pretrial order that reserved ruling on the Plaintiffs' motion until the issues arose during the trial.

In addressing the relevancy of Dr. Vogler's opinion in its pretrial order, the trial court noted that it had difficulty with Ford's argument that "excessive risk can be determined by comparing the Explorer design to other vehicle designs." E.R., p.

29. The court specifically was troubled by the fact that

That concept, carried to the extreme, would suggest that vehicles which rolled over 95% of the time they were driven, would be safe, if all other vehicles rolled over at the same or a higher percentage rate. RCW 7.72.030(1) calls for a "reasonably safe" product. An otherwise unreasonably safe product cannot be considered reasonably safe if it bodes well when measured against other unreasonably safe products.

E.R., p. 29.

The trial court also had difficulties with Ford's arguments relating to the substantial similarity requirement:

Defendant alleges that the "similarity" doctrine does not apply to Dr. Vogler's anticipated testimony, because her testimony is not for the purpose of asking the jury to draw a conclusion with no knowledge of the underlying probabilities. Rather, defendant suggests her testimony is for the purpose of assisting the jury in addressing the discrete issue of whether the Explorer presented an unreasonable, or excessive risk of harm relative to other vehicles. The court finds this argument somewhat disingenuous. The question is whether or not the vehicle is unreasonably dangerous with regard

to rollover potential. The answer does not rise or fall on whether or not other vehicles are unreasonably dangerous in that regard.

E.R., pp. 29-30.

The Plaintiffs also moved in limine to exclude Dr. Vogler's statistical evidence without first requiring a foundation as to the reliability of the data and the similarity of the vehicles and accident mode. Plaintiffs argued that statistical comparison evidence was irrelevant under FRE 402, because it was outside the issues framed by RCW 7.72.030(1), RCW 7.72.030(2) and RCW 7.72.030(3). Lastly, the Plaintiffs alleged that even if statistical evidence was relevant, the opinions of Dr. Vogler were inadmissible because they were derived from dissimilar incidents. The court also reserved ruling on this aspect of the Plaintiffs' motion in limine in its pretrial order.

D. The Trial.

As set forth above, Plaintiffs claimed that the 1998 Ford Explorer was defective and unsafe in its design because it was unstable and prone to tip and roll over. During the trial, the trial court allowed Ford to present evidence of other rollover crashes even though the circumstances of these rollovers were not similar to the Jaramillo rollover and involved other vehicle makes and models. Despite its earlier reservations and concerns about her testimony, the trial court also allowed Ford to present Dr. Vogler's testimony and many of her exhibits, notwithstanding the fact that her analysis relied on dissimilar accidents and vehicles.

Following 16 days of testimony, the jury returned a defense verdict in favor of Ford and this appeal followed.

V. SUMMARY OF ARGUMENT

Issue One

Evidence of other accidents is admissible only upon a showing that the other accidents are “substantially similar” to the accident at issue. *White v. Ford Motor Co.*, 312 F.3d 998, 1009 (9th Cir. 2002). Thus, it is an abuse of discretion for a trial court to admit evidence of other accidents unless the proponent of the evidence proves that the other accidents are substantially similar. *White v. Ford Motor Co.*, 312 F.3d at 1009, (citing *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1555 (9th Cir. 1994)). In this case, Ford failed to show that any of the other rollover crashes it presented to the jury were substantially similar to the crash in question, particularly when these rollover crashes involved different vehicle makes and models than the Jaramillo Explorer. Because Ford failed to make the required showing of similarity, the trial court abused its discretion in allowing Ford to present evidence of other rollover crashes involving vehicles and accident situations that were not substantially similar to the Jaramillo Ford Explorer.

Issue Two

A trial court abuses its discretion in allowing statistical evidence when the proponent of the evidence fails to prove that the accidents represented in the statistics were substantially similar to the accident at issue. *See Barker v. Deere and Co.*, 60 F.3d 158 (3d Cir. 1995). In this case, Dr. Vogler statistically compared rollovers of Ford Explorers with all other SUVs on the road in any kind of rollover. She also statistically compared SUV rollovers as a class with a number of other classes of vehicles. But in compiling this data, Dr. Vogler testified that she combined all rollovers of all SUVs for purposes of her analysis. She also testified that she made no effort to limit her data to “similar vehicles”. Because her statistical data and analysis relied on dissimilar rollovers and dissimilar vehicles, it was not reliable or relevant and served only to confuse the jury. The trial court abused its discretion in allowing Ford to present Dr. Vogler’s statistical testimony and exhibits derived from dissimilar rollovers and dissimilar vehicles.

VI. ARGUMENT

- A. The trial court abused its discretion in admitting evidence of other rollover incidents involving vehicles and accident situations that were not substantially similar to the Jaramillo Ford Explorer.**

Prior to trial, Ford filed a motion in limine objecting to evidence of other rollover crashes. The trial court denied Ford’s motion and allowed Plaintiffs to present six specific rollover incidents for the limited purpose of proving notice to

Ford of the Explorer's need for a more stable design. E.R., pp. 49-53. Plaintiffs' stability expert, Robert Anderson, selected these six rollover crashes from hundreds of Ford Explorer rollovers. *Id.* In making his selection, Mr. Anderson eliminated rollover crashes involving older models, two-door models, two-wheel-drive models, tire failures, single-steer rollovers, and off-road rollovers. E.R., pp. 51-53. Instead, Mr. Anderson limited his selection to on-the-road single vehicle rollover crashes involving Ford Explorers of the same design as the Jaramillo Explorer – i.e., later model, four-door, four-wheel-drive Explorers, and on-the-road single vehicle rollover crashes. E.R., pp. 52-53. The court did not admit, and the jury did not see, any documents relating to these six rollover crashes. Rather, the jury simply heard Mr. Anderson discuss these incidents during his testimony.

Following Mr. Anderson's testimony, Ford claimed that it was "entitled to respond" to Plaintiffs' evidence of the six similar Explorer rollovers. E.R., pp. 74-75. Ford argued that, "It's not just the Explorer. It's not just SUVs. Passenger cars, minivans, little cars, with a stability index much higher than the SUV that we are here to talk about, also roll over." E.R., p 74.⁵

In arguing for the admission of these other rollover crashes, Ford told the court that, "Mr. Anderson said that this vehicle (the Explorer) is defective because

⁵ A vehicle's stability index is determined by dividing the track width of the vehicle by its center of gravity height. A lower stability index means the vehicle is more likely to tip. A higher stability index number means that the vehicle is more stable.

of its narrow track width and its high center of gravity. We will show that these vehicles don't have that narrow track width and high center of gravity.” E.R., p. 72. Ford also represented several times to the court that the vehicles involved in the rollovers that it would introduce had a higher stability index than the Explorer. For example, Ford told the court that, “[t]he stability index on these vehicles is a high stability index,” E.R., p. 75, and that these vehicles “don't have that narrow track width and high center of gravity” of the Explorer. E.R., p. 72. In addition, Ford claimed that the stability indexes of these vehicles were within Mr. Anderson’s definition of a safe vehicle. *Id.*

But the evidence presented by Ford failed to live up to its promises. After describing a rollover event involving a Ford Escort passenger car, the witness, Ford’s expert witness Donald Tandy admitted that *he didn’t know the stability index* of that vehicle. He testified that had never investigated the stability index for the Escort, but nonetheless attempted to describe it as “much higher” than the Explorer. E.R., pp. 76-77.

Foundation objections relating to Mr. Tandy’s speculation regarding the static stability of the Escort were sustained E.R., p. 77, but the damaging testimony had already been given that small passenger cars with “much higher” static stability than the Explorer could roll on smooth dry pavement.

Mr. Tandy then testified regarding a rollover crash involving a GM Astro minivan. On cross-examination, Mr. Tandy admitted that the Astro van has a static stability factor *identical* to what he had calculated for the Explorer. E.R., p. 78. This directly contradicted the representations of Ford's attorney, who had had told the court that the purpose of this testimony was to show that "minivans ... with a stability index much higher than the SUV that we are here to talk about, also roll over." E.R., p. 74.

When a party wishes to offer evidence of other accidents or occurrences, the proponent of that evidence must show that the facts and circumstances of the other accidents or occurrences are substantially similar to the facts and circumstances at issue in the case. *See White v. Ford Motor Co.*, 312 F.3d 998, 1009 (9th Cir. 2002) (*quoting Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991)). This Court reviews a district court's decision to allow such evidence for abuse of discretion. *White v. Ford Motor Co.*, 312 F.3d at 1009 (*citing Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1555 (9th Cir. 1994)). Evidence of other incidents "threatens to raise extraneous controversial issues, confuse the issues, and be more prejudicial than probative." *J.B. Hunt Transport, Inc. v. General Motors Corp.*, 243 F.3d 441, 445 (8th Cir. 2001) (*quoting Lovett v. Union Pac. R.R.*, 201 F.3d 1074, 1081 (8th Cir. 2000)). For these

reasons, the proponent of such evidence has the burden of proving that the other incidents are substantially similar. *Id.*

In vehicle design cases, courts are particularly cautious about admitting evidence of other collisions involving different vehicle. For example, in *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993), the court held that the trial court properly excluded evidence of other collisions because they involved different models and model years than the subject vehicle:

None of the other alleged accidents at issue appear to have involved the precise mechanical defect alleged by Johnson. Moreover, all of these complaints and claims involved either different models of Ford vehicles or Escorts with model years different from the 1983 1/2 Ford Escort driven by Darlene at the time of her accident

Johnson v. Ford Motor Co., 988 F.2d at 579-580.

In this case, the trial court allowed Ford to introduce evidence of other accidents involving vehicles that are substantially different from the 1998 Ford Explorer. This evidence was irrelevant to the issues in this case and was confusing and misleading. Although the court sustained Plaintiffs' objections relating to Mr. Tandy's speculation regarding the static stability of the Escort, the jury had already been misled by testimony and argument that small passenger cars with "much higher" static stability than the Explorer could roll on smooth dry pavement.

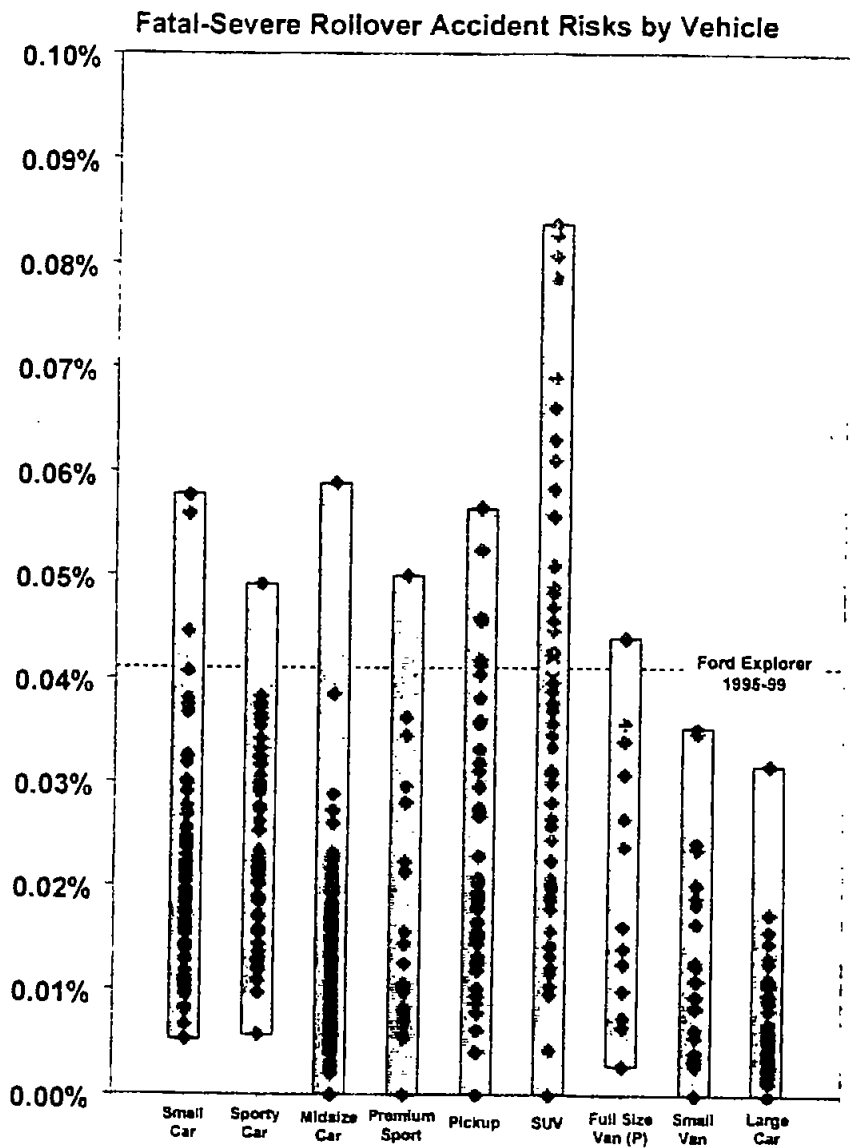
A number of cases have held that it is an abuse of discretion to allow evidence of other accidents when the proponent of the evidence fails to

demonstrate that the other accidents were not substantially similar or involved products that differed from the product at issue. For example, in *Barker v. Deere and Co.*, 60 F.3d 158 (3d Cir. 1995), the plaintiff attempted to prove a defect in the defendant's tractor by introducing statistics related to tractor accidents in general, rollover accidents, and fatalities resulting from passenger ejection. The appellate court reversed the plaintiff's verdict, finding that the trial court had abused its discretion in allowing the evidence because the plaintiff had failed to prove that the prior accidents were substantially similar to the accident at issue. Similarly, in *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 502 (8th Cir. 1993), the plaintiff attempted to demonstrate that a nailer was unreasonably dangerous by introducing evidence of other accidents involving other types of nailers. The appellate court reversed the plaintiff's verdict, holding that the trial court had abused its discretion in allowing evidence of prior accidents because the plaintiff had not demonstrated that the other accidents were substantially similar, and many of the other accidents involved different models of nailers.

Here, Ford failed to show that the rollover evidence it introduced was substantially similar to the Jaramillo rollover. The cases discussed above make it clear that proponents of this type evidence must meet this foundational requirement before the court may admit it. Because Ford failed to do this, the trial court abused its discretion in admitting this evidence.

B. The trial court abused its discretion in admitting Dr. Vogler's statistical evidence of dissimilar accidents and vehicles.

Dr. Vogler purported to compare rollovers of Ford Explorers (1995-2000) with all other SUVs on the road in any kind of rollover in the following graph:



Arkansas 1991-98 Florida 1991-98 Maryland 1991-98 North Carolina 1991-98 Pennsylvania 1991-98
Vehicles with Decodable VIN and Sufficient PVY

Design Research Engineering

(5)(9)

E.R., p. 20, 217. Dr. Vogler ranked the Ford Explorer in the middle of this graph, even though she rated more vehicles as performing better than the Ford Explorer than worse than the Ford Explorer. E.R., pp. 210-214.

Based solely upon this alleged statistical analysis, Dr. Vogler testified that, when compared with other SUVs and with all other vehicles, the 1995-1999 Ford Explorer does not present an unreasonable risk of harm to occupants in rollovers. E.R., p. 14; see also, Transcripts Vol. 13, p. 2738. This opinion was junk science at its very worst because Dr. Vogler's conclusions were based upon an improper evidentiary foundation, and her evidence was not relevant to the issues in this case.

Dr. Vogler is a mechanical engineer. E.R., p. 184, 187. Her husband worked for Ford. E.R., p. 211. They are Ford stockholders. *Id.* Dr. Vogler is not a statistician. E.R., p. 184. She is a principal in a defense forensic consulting firm known as Design Research Engineering (DRE). E.R., p. 197. According to her testimony, and the list of her prior testimony she works almost exclusively for vehicle manufacturers, with Ford Motor Company being her biggest client. E.R., p. 203. She indicated on her list that has testified for Ford in 139 cases. E.R., p. 204. She has provided "comparative risk" analysis on many Ford products involved in rollovers including Econoline vans, Explorers, and the notorious Bronco IIs. E.R., p. 197-204. Ford has paid Design Research Engineering \$7,089,254 from 1996 to 2001. E.R., p. 203.

Dr. Vogler testified that she compiles her data from the accident databases of six states. E.R., p. 155. She testified that she uses these specific databases because their accident reports contain vehicle identification numbers (VINs). E.R., p. 156. When complete and accurate, VINs identify specific vehicle makes and models. E.R., p. 166.

Dr. Vogler also testified that these databases contain inaccurate or incomplete VIN numbers. To sort out mistaken and missing numbers, Dr. Vogler testified that DRE invented its own VIN sorting system rather than using the tried, true and tested commercially available VIN sorting programs such as VINA and VINDICATOR. E.R., p. 164-166. She also testified that DRE's program is deemed "proprietary" and "secret" and has therefore never been reviewed by any outside source, *i.e.*, it has not been "peer reviewed." E.R., pp. 215-216. This is a crucial flaw in Dr. Vogler's methodology because even a few errors can skew the results.

Worse yet, Dr. Vogler testified that her data combines all rollovers of all SUVs because she has no way of segregating the data based on different accident scenarios. E.R., pp. 181-182, 208. Therefore, she testified that off-road rolls, curb strike rolls, collision induced rolls, high speed rolls, low speed rolls, etc., are all lumped together for purposes of her analysis. E.R., pp. 2, 9-12. She also testified that she made no effort to limit her data to "similar vehicles." E.R., pp. 181, 208. She testified that in the case of SUVs this means that her list includes anything that

any manufacturer calls an SUV without an attempt to distinguish between large SUVs, small SUVs, loaded, unloaded, two door, four door, two-wheel-drive, four-wheel-drive, narrow wheel base and wide wheel base SUVs. E.R., pp. 112, 182-184. The data is then manipulated to place the vehicle du jour in the center of the bar graph. Based upon the alleged “comparison,” since the vehicle is near the middle of the graph, it is not unsafe. E.R., pp. 20, 217.

The SUV with the worst record on Dr. Vogler’s graph (at the very top) is the Ford Bronco II. E.R., pp. 20, 209, 217. Dr. Vogler testified that both the Bronco II and Explorer vehicle designs are “safe” and do “not present an unreasonable risk ... to the vehicle occupants.” E.R., pp. 14, 180. Even though she admits that the National Highway Traffic Safety Administration (NHTSA) star rating system for static vehicle stability puts the Explorer near the bottom of the pack, she says the Explorer design is safe, as is the even worse Bronco II. E.R., p. 180. In a Bronco II case (*Devore v. Ford*), Dr. Vogler wrote a Fed. R. Civ. P. 26(a)(2)(B) report which says the Bronco II “is a safe vehicle design and does not present an unreasonable risk of an accident or injury ...” E.R., p. 24. This is virtually the same report she submitted in the instant case, the only significant change being the different vehicle. Compare E.R., 21-24 with E.R., 222-225. In fact, of all the hundreds of vehicles/rollover cases, she has never seen an unsafe design. E.R., p.

14. Since the worst vehicle is the same as the best vehicle, no vehicle can fail her test.

As discussed above, it is well established that evidence of other incidents must be “substantially similar” to be admissible. The seminal case is *Ault v. International Harvester*, 13 Cal. 3d 113 (1975).⁶ This is true even where the evidence purports to be “statistical.” *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3d Cir. 1995) (statistical extrapolation); *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 24 (Ga. 2001) (adjustment statistics); *James v. G.M. of Canada Ltd.*, 790 P.2d 138, 145 (Or. App. 1990) (statistics of other ejections).

Kloepfer v. Honda Motor Co., 899 F.2d 1452 (10th Cir. 1990) involved a three-wheel all terrain vehicle. The court held that proffered evidence that “did not relate to ... this accident or to the Honda model involved herein, but rather accidents, injuries and statistics involving all all-terrain vehicles manufactured by over twenty manufacturers,” was properly excluded. *Id.* at 1458. *See also Soden v. Freightliner*, 714 F.2d 498, 503 (5th Cir. 1983) (statistics rejected in part where prepared solely for litigation and not part of a published study).

In *Barker v. Deere and Co.*, 60 F.3d 158 (3d Cir. 1995), the court held that the trial court had abused its discretion in allowing statistical evidence because the

⁶ “[E]vidence of other accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote.” *Ault* at 122. *See also Johnson v. Ford Motor Co.*, 998 F.2d 573 (5th Cir. 1993); *Ray v. Ford Motor Co.*, 514 S.E. 2d 727 (Ga. App. 1999).

plaintiff had failed to prove that the accidents represented in the statistics were substantially similar to the accident at issue:

We now turn to analysis of whether evidence of rollover accidents is relevant to prove: (1) a design defect; and (2) that an alternative, safer, feasible design existed.

...

We note that every court of appeals to have considered this issue agrees that when a plaintiff attempts to introduce evidence of other accidents as direct proof of a design defect, the evidence is admissible only if the proponent demonstrates that the accidents occurred under circumstances substantially similar to those at issue in the case at bar.

This foundational requirement of establishing substantial similarity is especially important in cases where the evidence is proffered to show the existence of a design defect. In such cases, the jury is invited to infer from the presence of other accidents that a design defect existed, which contributed to the plaintiffs' injuries.

We observe that the district court must be appraised of the specific facts of previous accidents in order to make a reasoned determination as to whether the prior accidents are "substantially similar." Absent such a foundation, it is impossible for the district court in the first instance, and for this court on appeal, to review the facts in order to make a determination as to similarity.

Our primary concern is that Barker has not presented sufficient evidence, which could lead the district court to believe that the prior accidents were in any way similar to the case before us. The record contained only raw numbers and statistical extrapolations. At most, we are able to discern from the testimony of Barker's expert witness that approximately 190 persons (30% of 640 fatalities) were killed in tractor accidents as a result of being: (1) ejected from the seat; (2) run over; and/or (3) hit by a falling object. However, there are no documented cases of an injury/death arising from an accident with a Deere 620 tractor where an object entered the operator area and ejected the operator from his seat. We hold Barker failed to offer sufficient evidence to prove that any prior accident is "substantially similar" to the accident which led to his injuries.

Moreover, what scant evidence was admitted did not contain any specific information with regard to the details of any single accident. All evidence of accidents where an object entered the operator area was presented via the National Safety Council statistics. This evidence concerned tractors generally, not specifically John Deere tractors and not Deere 620 tractors. Furthermore, most of the evidence of fatalities was characteristic of rollovers, and we are uncertain of the specifics of any non-rollover accidents. Barker was attempting to prove a defect in the Deere 620 tractor by submitting evidence of injuries/deaths and evidence of a possible defect in other tractors that were involved in rollover accidents. The jury was invited to infer that over 500 lives per year would be saved if there were a rollover bar on the Deere 620 tractor. We fail to comprehend how any of the prior accidents were "substantially similar" to the case before us. All of the evidence of prior tractor accidents that was introduced as direct evidence of a design defect should have been excluded as irrelevant pursuant to Rule 402.

Barker, 60 F.3d at 162-163 (citations and footnotes omitted).

Dr. Vogler made no effort to identify any similar accidents or similar vehicles in her data. This is a substantive evidentiary predicate, the failure of which results in exclusion of the evidence. Washington's unique definition of the "relevant product"⁷ heightens the "similarity" requirement because we are not concerned about the vehicle as a whole, but rather the specific component design failures of seat belts, roofs, and stability components. Dr. Vogler's statistical comparison evidence did not focus on the "relevant products." Her testimony had nothing to do with restraints, roof strength, or stability. Her testimony had nothing to do with performance of the "relevant" product or products in the same or similar

⁷ See RCW 7.72.010(3) ("the 'relevant product' ... is that product or its component part or parts which gave rise to the product liability claim").

accident mode. Ford's purpose for introducing this evidence was to confuse and mislead the jury. Because of this, the trial court abused its discretion under FRE 402 and 403 in allowing this evidence. More importantly, the trial court abused its discretion in allowing Dr. Vogler's testimony because Ford failed to show a substantial similarity between the Jaramillo collision and the collisions and vehicles upon which Dr. Vogler's statistical data was based. Under the applicable law of this, and all circuits, this was reversible error.

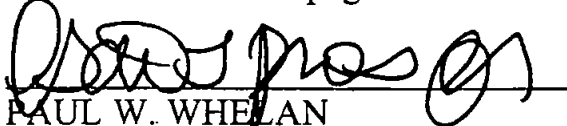
VII. CONCLUSION

Because the trial court abused its discretion in admitting the evidence discussed above, the Plaintiffs request that this Court reverse the judgment entered in the trial court in favor of Ford, and remand this case back to the trial court for a new trial.

VIII. CERTIFICATION OF COMPLIANCE (CIRCUIT RULE 32(e)(4))

This brief is prepared in 14 pt proportional typeface and does not exceed

14,000 words or 30 pages.



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IX. STATEMENT OF RELATED CASES (CIRCUIT RULE 28-2.6)

There are no known related cases pending in this court.



PAUL W. WHELAN
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DATED this 8th day of August, 2003.



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