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U.S. COURT OF APPEALS**

No. 03-35326

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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. KELLEY ARNOLD
U.S.D.C. No. CV-01-05311-JKA

APPELLANTS' REPLY BRIEF

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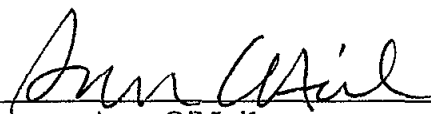
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Seattle, Washington on October 8, 2003.



Ann O'Neil

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INTRODUCTION

In closing argument Ford's counsel told the jury that Plaintiffs had played a "shell game" with the evidence. F.E.R. 292, 293. "Why didn't they lift up the shell and say, I got no peanut," he said. F.E.R. 294. But it was Ford that played a "shell game," confusing the jury with irrelevant statistics, and tricking the trial court with a false promise to prove that vehicles with "a stability index much higher" than the Ford Explorer also roll over. E.R. p 74.

Ford continues its game with this Court. Ford argues that it was not required to meet the substantial similarity requirement with its statistics because it offered these statistics to show comparative risk. Ford's Brief at 13, 15, 18. Ford claims, without any authority to back its statement, that "in order for statistical evidence regarding accident and injury *rates* to be probative, it only needed to be relevant to the safety of the Explorer and other SUVs, both in absolute terms and relative to other vehicles that plaintiffs claimed were safer." Ford's Brief at 16-17.¹ This is the same argument that the trial judge found "disingenuous" in his pretrial order:

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

¹ Plaintiffs purposely elected not to compare the Ford Explorer to any specific vehicle during their case in chief, and made no claim that any specific vehicle was "safer" than the Ford Explorer.

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 trial judge was correct in his observation that Ford's evidence lacked probative value as to whether or not the Ford Explorer is unsafe because of its rollover potential. The trial judge was also correct in his assessment that the answer does not rise or fall on the safety of other vehicles. Because of this, the trial judge later erred in admitting this evidence without a showing of substantial similarity between the circumstances in Ford's statistical evidence and the circumstances of the Jaramillo rollover.

Ford also claims that the probative value of the Escort and Astro Van accidents was in the "dissimilar nature of the vehicles." Ford's Brief at 17. But Ford's expert did not know the stability index of the Ford Escort and he was forced to admit that the Astro Van had the same stability index as the Ford Explorer. E.R., pp. 76-78.

ARGUMENT

A. Ford Failed to Lay Promised Foundation for Other Incident Evidence

One of Ford's chief defenses at trial was that any vehicle can roll. Ford attempted to prove this by presenting statistics and by presenting evidence of two rollover accidents involving vehicles that were not similar to the Jaramillo's four-

door, four-wheel drive 1998 Explorer. Ford argued to the court 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. Ford told the court that, “We will show that these vehicles don’t have that narrow track width and high center of gravity.” E.R., p. 72. 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.

But having promised all that, Ford utterly failed to live up to its promises, and failed to lay any proper foundation for the evidence that it presented.

In fact, there was little pretense of laying a proper foundation for the “other incident” testimony; the idea seemed to be to simply get it in. Ford’s expert, Donald Tandy, hastily testified about a rollover crash involving a Ford Escort passenger car, then admitted that *he didn’t know the stability index* of that vehicle, and that he’d never investigated it. E.R., pp. 76-77. This admission made a lie of Ford’s argument the prior afternoon. By then, however, the damage was done; the jury had heard what Ford wanted them to hear—that any vehicle can roll over. After plaintiffs’ foundation objections were sustained, Mr. Tandy testified similarly regarding an apparent rollover crash of a GM Astro minivan. Tandy had little information about the Astro rollover.

Q. Do you know how many times that vehicle rolled?

A. I did not reconstruct it in terms of number of rolls. I investigated this crash in terms of crash causation—or not really crash causation, but just investigated it.

F.E.R. 290.

However, Tandy admitted on cross-examination that the Astro van has a static stability *identical* to what he had calculated for the Jaramillos' Explorer. E.R., p. 78. Again, this admission directly contradicted Ford's representation 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 (emphasis added). And once again, the damage of the testimony was done; the jury heard "evidence" of yet another rollover involving a vehicle that appeared different from the Ford Explorer. It was done in a flash—like a shell game.

Although the court sustained Plaintiff Jaramillo's objections to the stability evidence of the Ford Escort, Ford now tries to claim that admission of these incidents was harmless error because it was just sixteen lines of testimony. Ford's Brief at 30. This is not true. In fact, the presentation of this evidence occurred over six pages of the transcript—more if necessary cross examination is counted. Mr. Tandy set the stage by testifying that "It doesn't mean passenger cars are immune. Passenger cars can roll over. There's many documented passenger car rollovers

every year.” F.E.R. 285.² He later testifies that rollovers include “All kinds of vehicles. In terms of count, more of those would be passenger cars than anything, because there’s more passenger cars on the road. But also you’d have pickup trucks and vans and utility vehicles, and other things, commercial vehicles.” F.E.R. 287. He goes on to describe his experience investigating rollover vehicles, including “rollovers of vehicles other than SUVs.” F.E.R. 287-288. After testifying about the Escort and Astro rollovers at issue here he concludes “No, no vehicle is immune from rollover in my opinion.” F.E.R. 291.

The testimony itself was prejudicial in tone. Tandy testified that the driver of the Escort “allowed it” to go off road, then “yanked it back” and “overcorrected.” F.E.R. 288. In other words, he paints a vivid picture of driver error – then, a few lines later admits that he doesn’t know the stability factor for the vehicle and hasn’t even investigated that number. Not a word is said about other details of the vehicle or accident – loading of the vehicle, modifications to the suspension or tires, road conditions, failures, etc.

Although the jury ultimately decided for Ford Motor Company, this was a close, hard fought case. The jury deliberated five full days before finally delivering a verdict. Just prior to reading the verdict the trial judge said “I wish that we had video taped this trial and used it as a training film.” F.E.R. 317. He said the parties

² Mr. Tandy then admits “but in some situations you may have less resistance to rollover in this vehicle [the Explorer]” F.E.R. 285.

“certainly had their day in court and, as I say, were well represented.” F.E.R. 317. In a civil jury trial where a mere preponderance of evidence is required for a verdict, evidence does not need to be huge to tip the scales in one direction or the other. “The risk is greater that a particular error tipped the scales in a close case than one in which the evidence was extremely one-sided.” Wright, Miller & Kane , *Federal Practice and Procedure*, Civil 2d § 2883 (1995).

If error has been committed in a jury trial, which, within the range of appreciable probability could have affected the verdict, such error will be presumed to have done so. This presumption is rebutted if, upon the whole record absent the erroneous matter, no reasonable and honest jury could have returned a different verdict, i.e., in a civil case the trial court would have been justified in directing a verdict for the respondent. If, however, the errors were such as to deprive the complaining party of a fair trial by an impartial jury, a new trial should be ordered regardless of the quantum of evidence.

Id. at 2883, n.4 (citing Comment, Principles for Application of the Harmless Error Standard, 41 U.Chi.L. Rev. 616 (1974)).

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 substantially similar or when the proffered evidence involve products that differed from the product at issue. 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.

Failure to lay adequate foundation of substantial similarity is also grounds for reversal. The court of appeals held that the trial judge had abused his discretion in a product liability case by allowing evidence involving another model rifle where the plaintiff had "failed to lay an adequate foundation for the Model 600 evidence." *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1109 (8th Cir. 1988). The court in *Lewy* said that

In deciding on the admissibility of evidence concerning similar occurrences the trial court must satisfy itself that a proper foundation exists for the evidence to be received by the court. There is no question that it is the jury's role to weigh the evidence, but it is the judge's obligation to determine whether it gets on the scale.

Id. Here, Ford failed to lay the foundation that it promised the court it would

provide – i.e., that the Escort and Astro van had higher static stability than the Ford Explorer in question. Moreover, Ford’s expert was unaware of details of the accident and admitted, in each case, that he had not investigated those details.

Error is not harmless simply because it involves a small number of dissimilar incidents. A verdict in a case involving a defective stepladder was reversed when “the plaintiff failed to show sufficient similarities between the two prior accidents and the plaintiff’s accident, since different model ladders were involved, there were different conditions existing at the time of the accident, and the ladders were erected at different angles.” *Asby Div. Of Cons. Aluminum Corp. v. Lindsay Lumber Co.*, 458 So.2d 335 (Fla. 1st DCA 1984).

Ford suggests that Plaintiffs opened the door to evidence about other vehicles by presenting evidence relating to Ford’s earlier utility vehicle, the Bronco II. However, the Explorer was nothing but a redesign and renaming of the Bronco II. Ford documents called the original Explorer design the “1990 ½ Bronco II” and the “four-door Bronco II.” F.E.R. 191-195, 198. The vehicles shared a large number of parts and design features with the original Explorer. F.E.R. 265. Ford’s witness admitted that the engine height – a key factor influencing center of gravity height and stability – was identical for the Bronco II and Explorer. F.E.R. 265. As stated in Plaintiffs’ closing “the reason we presented the evidence was because Ford should have learned some lessons.” F.E.R. 295.

Contrary to a statement in Ford's brief, Plaintiffs never "attempted to prove liability by references to SUVs as a class and to vehicles other than the 1998 Ford Explorer." Ford's Brief p. 5. Plaintiff did present evidence that the Ford Explorer was a redesign of the Ford Bronco II. The Bronco II was referenced in many Ford documents relating to the design of the Explorer. F.E.R. 296-297; 302-310; 311-316. It would have been virtually impossible to discuss the design, testing and development of the Ford Explorer without referencing the Bronco II.

The Bronco II provided Ford notice of the hazard of its SUV design and an opportunity to scrap the design slightly and start over. In June 1989, Consumer Reports published an article entitled "How Safe is the Bronco II" and showed a photograph of a Bronco II tipping over on its cover. F.E.R. 21. However, Ford instead opted to simply tweak the design by lowering it and widening it slightly. As a result, the Explorer performed similarly to the Bronco II in stability and lane change tests at Ford. F.E.R. 302-310; 311-316.

B. Contrary To Its Claims, The Trial Court Erred By Not Requiring Ford To Show A Substantial Similarity Between The Rollovers In Its Statistical Data And The Jaramillo Rollover.

Relying on a footnote in a First Circuit case, *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999), Ford disingenuously argues that the "substantial similarity" requirement somehow does not apply to defendants. But the *Trull* footnote is at best dictum, and the *Trull* court specifically limited its

statement to the “circumstances here.” *Id.* at 98, n.9.

Ford also ignores a number of cases that require a showing of substantial similarity by the *proponent* of the evidence. The general rule is that “[e]vidence of other accidents in products liability cases is relevant to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident.” *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988); *see also Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1185 (7th Cir.1992). “However, before such evidence will be admitted, the *proponent* must show that the other accidents occurred under substantially similar circumstances.” *Nachtsheim*, 847 F.2d at 1268 (emphasis changed); *see also Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir.1993), *cert. denied*, 510 U.S. 1115, 114 S.Ct. 1063, 127 L.Ed.2d 383 (1994); *Ross* at 1185; , *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1408 (10th Cir.1988) (“Before introducing such evidence, the *party* seeking its admission must show the circumstances surrounding the other accidents were substantially similar to the accident involved in the present case.”) (emphasis added); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981).

Although the plaintiff will usually be the proponent of data relating to other accidents, it is illogical to say that the rule does not apply if the defendant seeks to introduce evidence of other accidents to show the lack of the danger, or to show a lack of causation. This is especially true under the circumstances here, when Ford

failed to show that any of the other rollover crashes it presented to the jury were substantially similar to the crash in question, and when these rollover crashes involved different vehicle makes and models than the Jaramillo Explorer. As set forth in Plaintiffs' Opening Brief, Dr. Vogler's data combined all rollovers of all SUVs because she had no way of segregating the data based on different accident scenarios. E.R., pp. 181-182, 208. Therefore, off-road rolls, curb strike rolls, collision induced rolls, high speed rolls, low speed rolls, etc., were all lumped together for purposes of her analysis. E.R., pp. 2, 9-12. She also made no effort to limit her data to "similar vehicles." E.R., pp. 181, 208. In the case of SUVs this means that her list included 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. Dr. Vogler then manipulated the data to place the subject vehicle 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. As the trial judge observed, if this concept were carried to the extreme, it

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.

Dr. Vogler's statistical manipulations also fail to take into account that under Washington law, the focus is not on the safety of the vehicle as a whole, but rather it is the safety of vehicle's components that are at issue. *See Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 24-25, 724 P.2d 389 (1986); *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1067 (9th Cir. 1994).³ Here, the issue is not the safety of the Ford Explorer as a whole, but the safety of the Explorer's design as it relates to the "relevant product" – the components that relate to the vehicle's stability under the crash circumstances such as those presented in this case.⁴ Ford attempts to get around this by arguing that its statistics were relevant under RCW 7.72.030's risk/utility test and consumer expectation test. But contrary to Ford's attempt to show relevancy, the statute focuses specifically on the "likelihood that the product would cause the *claimant's harm*." RCW 7.72.030(1)(a) (emphasis added). Additionally, it is the risk of harm suffered by the claimant that forms the basis for the consumer expectation test of RCW 7.72.030(3), not how safe the product might be in general when compared to other products of a similar nature:

In determining whether a product was not reasonably safe ... the trier

³ Washington Product Liability Act defines the "relevant product" to be "... that product or the component part or parts which gave rise to the product liability claim." RCW 7.72.010(3).

⁴ This case involved an avoidance maneuver – deer suddenly appeared on the roadway.

of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

RCW 7.72.030(3).

Ford also argues that this evidence of dissimilar accidents was also somehow relevant in determining whether Ford had a duty to provide post manufacture warnings about the rollover danger of the Ford Explorer under RCW 7.72.030(1)(c). *See* Ford's Brief at 26-27. The statute itself states that the duty arises when "a reasonably prudent manufacturer should have learned about *a danger* connected with the product after it was manufactured." RCW 7.72.030(3)(1)(c) (emphasis added). Despite this, Ford fails to explain how evidence of dissimilar accidents relates in any way to its duty to warn about the rollover hazard that the Explorer exhibited under the yawing circumstances of this case. Additionally, any probative value of this evidence for this purpose was substantially outweighed under Evidence Rule 403 by its potential to confuse and mislead the jury.

Similarly, Ford argues that Ms. Vogler's evidence was somehow relevant under RCW 7.72.050(1), which allows the jury to consider evidence of industry custom in the product seller's industry or of technological feasibility, whether relating to design, construction, or performance of the product. Ford's Brief, p. 27. But Ford's evidence did not have anything to do with industry custom. Again, assuming that this evidence had even a remote connection to industry custom, its

probative value was substantially outweighed by its potential to mislead and confuse the jury.

Lastly, throughout its brief, Ford states that the Plaintiffs “opened the door” to Ms. Vogler’s statistics. *See* Ford’s Brief at 5, 7, 14, 18. But it was Ford’s own Fed. Rule Civ. Proc. 30(b)(6) designee who testified regarding Ford’s own accident statistics from engineering documents produced by Ford, and it was Ford’s own witness Donald Tandy, who introduced rollover incidents involving vehicles other than the Explorer. *See* S.E.R., 31-35 and F.E.R. 288-291. In other words, Ford was allowed to put on Ms. Vogler’s statistical evidence to refute statistics produced from Ford’s own documents and to explain incidents introduced by its own witness. In any event, the Plaintiffs’ evidence merely established that rollover collisions present a grave hazard⁵ to passengers in vehicles in terms of severity of injury. Nothing presented by the Plaintiffs opened the door to statistics that compared everything from small sports car rollovers to SUV rollovers and everything else in between.

Contrary to its claims, Ford has failed to put forth any compelling arguments justifying the trial court’s admission of Ms. Vogler’s statistics. The trial court was clearly troubled by this evidence in its pretrial order. Clearly, the trial court erred at trial by not requiring Ford to show a substantial similarity between the rollovers in


⁵ The seriousness of the harm was one of the elements plaintiffs had to prove. RCW 7.72.030(1)(b).

its statistical data and the Jaramillo rollover. Because of its misleading nature and the strong potential of this evidence to confuse the jury, this error was not harmless as claimed by Ford. Ms. Vogler testified for several hours. The jury had her charts and graphs in the jury room. The trial court's error went to heart of the case and it played into Ford's shell game of hiding the relevant evidence from the jury. For this reason, as well as those above, the judgment entered in favor of Ford in this case should be reversed and this case remanded back for a new trial.

CONCLUSION

The trial court abused its discretion in admitting the evidence discussed above. Because of this, 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.

DATED this 8 day of October, 2003.



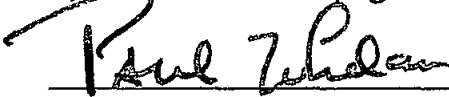
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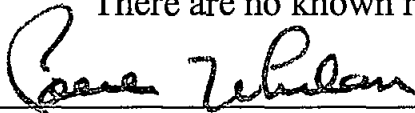
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STATEMENT OF RELATED CASES (CIRCUIT RULE 28-2.6)

There are no known related cases pending in this court.



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